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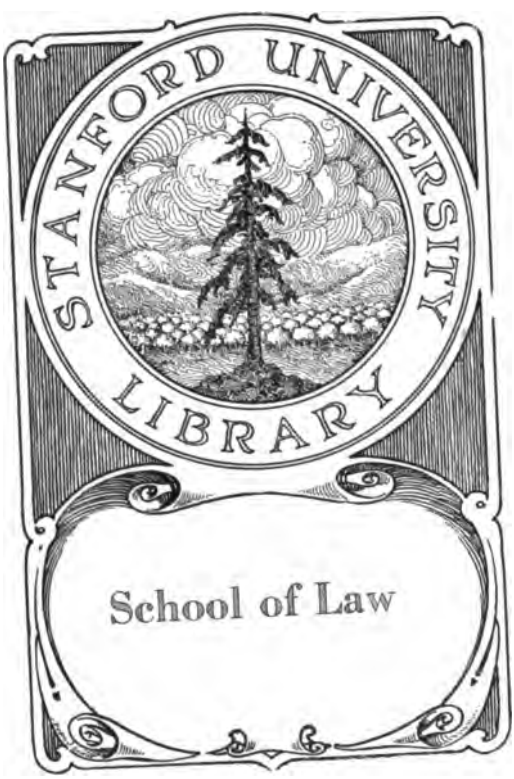

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DIARY FOR JANUARY.

1. Sat.....*New Year's Day.* Holiday in H. C. J.
2. Sun.....*2nd Sunday after Christmas.*
3. Mon....Co. Ct. term begins. Lord Eldon died 1838, æt. 87.
6. Thur...*Epiphany.* Christmas vacation H. C. J. ends.
8. Sat.....Co. Ct. term ends. Christmas vacation in Exchequer Court ends.
9. Sun.....*1st Sunday after Epiphany.*
10. Mon....Christmas vacation in Sup. Ct. Canada ends.
11. Tues...Sittings of Court of Appeal begin.
12. Wed...Sir Chas. Bagot, Gov.-Gen., 1842.

TORONTO, JANUARY 1, 1887.

MORTGAGEES AND THE STATUTE OF LIMITATIONS.

FOLLOWING close upon the case of *Newbould* v. *Smith*, 55 L. T. N. S. 194, to which we recently referred (see *ante* p. 373), comes the deliverance of the Judicial Committee of the Privy Council in *Lewin* v. *Wilson*, 55 L. T. N. S. 410, on appeal from the Supreme Court of Canada (since reported in 11 App. Cas.). In this case *Newbould* v. *Smith* is not referred to, and the decision arrived at appears very materially to modify the effect of that case.

The facts in *Lewin* v. *Wilson* were very simple—a principal and surety joined in a bond to secure a debt, and as collateral security for the bond, the surety gave a mortgage. In this mortgage the proviso for redemption stipulated that the mortgage should be void on payment of the mortgage debt, either by the mortgagor or by the principal debtor, the latter, however, was no party to the mortgage, and was not bound by any covenant therein. The principal paid interest on the debt down to 1879, but no payment had been made by the surety himself. The action was brought to foreclose the surety's mortgage, and the question was whether payment by the principal prevented the statute from running as against the surety in respect of the land covered by his mortgage. The majority of the judges of the Supreme Court thought that the result of the authorities was to establish that a payment in order to prevent the statute from running must be made by the mortgagor, or by some person in privity of estate with him, or the agent of one of them; in short, that the only person competent to make a payment sufficient to stop the statute is one who is competent to give an acknowledgment of title. Strong, J., however, dissented from this view, and the Privy Council have determined that the conclusion at which he arrived was the correct one.

In *Bolding* v. *Lane*, 1 D. G. & S. 122, Lord Westbury determined that an acknowledgment of the mortgage debt given by the mortgagor would not bind a *puisne* incumbrancer. But in *Lewin* v. *Wilson*, Lord Hobhouse, who delivered the judgment of the Privy Council, says "that payments made by a person who, under the terms of the contract, is entitled to make a tender, and from whom the mortgagee is bound to accept a tender of money, for the defeasance or redemption of the mortgage, are payments, which, by section 30 (see R. S. O. c. 108, s. 22) give a new starting-point for the lapse of time."

Assuming this to be an authoritative statement of the law it would seem to follow that a payment by a mortgagor, even after he has assigned or incumbered the equity of redemption, would prevent the

statute from running against the mortgagee, wherever the mortgagor is bound by a covenant to pay the mortgage debt, or the proviso for redemption stipulates that the mortgage is to be void on payment by him. There is no doubt that so long as the original mortgagor in such cases chooses to pay, the mortgagee is bound to accept payment, and it would certainly be in the highest degree unreasonable if payments made under such circumstances were not sufficient to keep the statute from running.

The rule deducible from *Newbould* v. *Smith* and *Lewin* v. *Wilson*, appears to be this: a payment to prevent the Statute of Limitations from running as against a mortgagee must be made by some person who, at the time of the payment is interested in the equity of redemption; or by some person from whom the mortgagee is bound to receive payment, whether such person be or be not interested in the equity of redemption at the time the payment is made; or the agent of some such person.

MOTIONS FOR NEW TRIALS.

EVERY sitting of the Divisional Court of the Chancery Division reveals the fact that there is a widespread ignorance in the profession as to the proper practice to be pursued in that Division in regard to motions to set aside verdicts and for new trials.

The sittings which have just taken place have been no exception. No less than eight applications were made to get cases set down which had not been set down owing to the slip of the solicitor engaged, and the difficulty is not lessened by the fact that the court has laid down a rigid rule, which it appears to be extremely loath to relax, that slips of solicitors are not a sufficient reason for granting any indulgence. The result was, that of the eight applications only one was successful, and that one, owing to the fact that it was unopposed, and that judgment had not been given in it a sufficient time before the sittings to permit the case to be set down within the time prescribed by Rule 522.

It may be that no injustice has been done in the seven cases. It may be that every one of them would have been affirmed, even if they had been set down and duly argued. At the same time the fact remains that the suitor, though entitled to have the opinion of the Divisional Court on the merits of his case, has been deprived of that privilege through no fault of his own, but owing to a mistake of his lawyer. Clients, we fear, will not view this mode of disposing of their cases with any satisfaction; and we think it is always to be regretted in the public interest when any suit goes off on any such ground, Courts of Justice must feel that their highest duty is to dispose of business, so that suitors may be reasonably satisfied that their causes have been fully heard and carefully considered, and no court can expect to satisfy the public when the suitors are driven from the judgment seat merely on the ground that some technical rule of practice has not been complied with.

We do not wish to exculpate solicitors who are at fault; at the same time we do not think the ignorance which appears to prevail upon this branch of practice is altogether the fault of the profession, The policy of the Judicature Act has had the effect of lulling them into a false security. They have rashly assumed that what that Act professedly aimed at effecting, namely, a perfect assimilation of the practice in all the Divisions of the High Court, has been, in fact, accomplished. Such experience as they have recently gained in the Chancery Division, has

somewhat rudely taught them, that in thinking thus, they have been living in a fools' paradise.

Why the practice should not be uniform we are at a loss to understand.

The Judicature Act, it is true, as passed by the Legislature, did prescribe a uniform practice on this point for all the Divisions, but one of the earliest exercises of the power of the Judges to make rules, was signalized by their passing rules to destroy this uniformity.

We do not say that the scheme prescribed by the original rules was perfect, or one that could not have been improved upon; but we cannot help thinking that the learned Judges would have acted more within the spirit of the Act, and would have saved a great deal of unnecessary complexity, if, instead of doing as they have done, they had striven to lay down a simple, expeditious and inexpensive procedure, and made it applicable to all the Divisions. As the practice now stands there is one rule for the Queen's Bench and Common Pleas Divisions, and another for the Chancery Division. In the Queen's Bench and Common Pleas Divisions, if the case has been tried by a jury, in order to set aside the verdict, an application for an order *nisi* is necessary; but in cases tried without a jury, then, in order to set aside the verdict, a notice of motion is necessary, and in order to make assurance doubly sure in some cases, we believe, it is customary, when an order *nisi* is obtained, to give notice of motion as well. It cannot be said by introducing this variety in practice the new rules have made any improvement in the practice which formerly prevailed.

In the Chancery Division, the same double practice is also prescribed by the rules of the Supreme Court, with the further extraordinary procedure that an application for the order *nisi* is to be set down, and notice of the application served. To get rid of this absurdity, however, the Judges of that Division passed a regulation in September last (see *ante* p. 293), whereby they determined not to grant orders *nisi*.

It appears to us that the present practice, as prescribed by the rules, is defective in two respects; first, in providing a different mode for making the application in jury and non-jury cases; and second, in providing that the practice in the Chancery Division is to be different from that of the other Divisions.

In these two respects we trust it may be soon amended. The retention of the old system of rules *nisi*, we believe to have been a mistake, and one that leads to a great waste of judicial time.

It is said that it saves time, because it enables the court to nip cases in the bud. But the question is whether many of these cases would ever be brought before the court at all, if, in every case, the applicant were exposed to the penalty of having to pay the costs of the motion if he failed. We do not think they would, and it is certain that in every case in which an order *nisi* is granted, the court first hears an argument on the motion for the order, and then a second argument on the motion to make it absolute. Then, again, is it not the fact that on not a few days during the sittings the Judges are not fully occupied, owing to the fact that the orders *nisi* are not ripe for hearing, owing to the delay which has necessarily to take place between the granting of the rule and the time of its return?

OUR ENGLISH LETTER.

Already the Christmas vacation is upon us, and the term almost at an end; nevertheless, it is agreed on all hands that the revival of business after the long vacation has been almost preternaturally slow. During the long vacation the stagnation was absolute. Ambitious juniors, willing to try what unfailing diligence would achieve in the way of winning the hearts of the solicitors, took nothing for their pains, and even men of greater standing who stayed in London during part of the vacation found that they had only wasted to no purpose a part of their much-needed holiday. Unquestionably the long vacation is a trying time for men who depend upon their profession for their subsistence, and there are few men who are not thoroughly weary of inactivity by the time that October has come. One objection to the long holiday lies not so much in itself as in its consequences. In other words, one would not complain bitterly if the legal machine was stopped for three months and then went on running as if nothing had happened. But the case is otherwise, since, after the long vacation, business is long before it ripens and regains a working or, so to speak, a lucrative condition. During this autumn and early winter, too, we have been beset by a series of *cause célèbres*, which, as all practical men know, are fatal to ordinary work, because they block the cause-list. There have been two—if two can form a series—and both of great interest.

First came the libel action against Lord Coleridge, of which it may be written that it was the very best thing, from Lord Coleridge's point of view, that could possibly have happened. Mr. Adams was beaten upon every point, and both the veteran Chief Justice and his son emerged from the trial with triumph, gaining the hearty sympathy not only of the profession, but also of the public. So offensive was the manner of the plaintiff, who had "a fool for his client," that the jury and the public were very near losing sight of the fact that something had happened which ought not to have been permitted. The late Lord Monkswell, it will be remembered, had consented to act as arbitrator, and to assess the damages in the original action brought by Mr. Adams. To that end there were sent to Lord Monkswell copies of all documents relating to the matter, and it was admitted that Lord Coleridge's solicitor's clerk sent a number of documents of which Mr. Adams had no knowledge. The jury found that this was an act of inadvertence, much to be regretted, on the part of the solicitor; but when one comes to reflect upon the matter in cold blood, at a time when the feeling of sympathy caused by the sight of the Chief Justice of England undergoing cruel and unnecessary torture has faded a little, it is not altogether easy to see how such a mistake could possibly have been made. It is true that Lord Monkswell wrote that the documents in question had not influenced his judgment; but then, how can a man tell, after arriving at a given conclusion, what has led him to it, and what has not? The case is not dissimilar to that of a jury who, having heard the answer to an inadmissible question, are told that they ought not to permit the words which they have heard to influence their judgment in the smallest degree.

Two good results may be expected from this great and lamentable case. We may anticipate, with some confidence, a reaction against the growing custom of giving extraordinary latitude to parties in person: coincidently there is ground for hoping that the tendency may be in the other direction, and that judicial notice may be taken of that lamentable waste of public time and money, of which parties in person are the source. Secondly, it is

to be hoped that, after this great example, steps may be taken to check that license in cross-examination of which Lord Coleridge said the other day that it caused people to loathe and detest not only the courts, but also the law.

Our other sensational case is the Colin Campbell divorce case, which is full of the most painful and disgusting details. At the present moment it has been progressing for rather more than a week. It promises to last, according to one of the counsel engaged, at least a fortnight more. From a legal point of view, it has no features of interest; but the columns of every paper are full of indications of the fact that the popular appetite for filth is ravenous. If any further proof is desired upon this point by any one in England, he has only to walk past the Courts of Justice, in front of which there assembles daily an enormous crowd.

The most important judicial change has been the retirement of Vice-Chancellor Bacon, the last of his order, full of years and honour. Of all the judges Sir James Bacon was far the most plentifully provided with shrewd and caustic humour, and it would be difficult to conceive a man more unlike him than his successor. Mr. Kekewich, Q.C., at the bar was about as dry a man as could be heard. Without attaining anything like eminence, he had an eminently lucrative practice, although rumour says that his practice would have been a greater indication of ability if the number of his clients had been a little larger. *Mais que voulez vous?* Rumour will always have something to say against a new appointment. We are promised a new batch of judges to fill vacancies to be caused by the resignations of Justices Grove, Field and Denman. I know of no ground for the rumour, and believe it to be an idle fancy. It is not, however, without plausible grounds, for Mr. Justice Field is very deaf; and Mr. Justice Grove is rich and is said to dislike law and like chemistry. The case of Mr. Justice Denman is different, for he is at least as good a judge as ever he was.

In conclusion, although late in time, a word must be said upon the appointment of Mr. Henry Matthews, Q.C.,—now Sir Henry—as Home Secretary. Unquestionably it is the most popular appointment that has been made since Mr. Gladstone promoted Sir John Holker, and if the Governmeut had wished to propitiate the bar by a well-chosen appointment, no better course could have been taken than by the selection of Mr. Henry Matthews.

Temple, Dec. 6.

SELECTIONS.

SUBSTITUTION OF MORTGAGES.

This question, along with the rights of intervening lien holders, is one that is scarcely mentioned by text-writers, though one that may be at times of vast importance. It would appear upon a casual observation that the establishment of liens should run from record date of instrument in force; but upon a careful consideration it will be seen that an equitable rule enters into the merits of this subject, and that the conclusion should be different from the one above suggested.

It may be stated, as a generally well-established rule of law, that the taking of a new note and mortgage, to secure an indebtedness already existing by note and secured by mortgage, will not discharge the lien of the first mortgage. In *Packard* v. *Kingman*, Smith and Kingman executed a mortgage on personal property to one Horner. On December 22, 1858, Smith and Kingman moved into a hotel property, and by statute a landlord's lien attached upon the effects of Smith and Kingman. On December 24, the plaintiff took a new note and mortgage for the balance unpaid of the debt, and at the same time released

the old mortgage. The Appellate Court, in passing upon the cause, takes occasion to say that "the taking of a new note and mortgage on personal property, to secure an indebtedness already evidenced by a note and mortgage on the same property, does not, even when the first note and mortgage are cancelled, operate to discharge the lien of such first mortgage." It is a proposition well established that the giving of one's note does not pay or extinguish the debt; so accepting the mortgagor's note for interest due on a mortgage does not pay that portion of the debt, nor discharge the lien of the mortgage to that extent.

In an action to reform a mortgage, the facts were shown to be as follows: A executed a mortgage to B, but made a mistake in description of property. He (A) made a second mortgage on same property to C, to secure a note given in payment of several long past due notes. Action by B to reform mortgage against C, who had no notice of mistake in first mortgage. *Held*, that action would lie, as second mortgage was given to secure a prior debt and no new consideration passed. The right of restoration is allowed where the holder of a first mortgage, in ignorance of the existence of a subsequent recorded one, releases his mortgage and takes a new one; and under such circumstances the first mortgagee would be entitled to have the mortgage restored, and given the original priority.

The surrender of unpaid notes, secured by mortgage, and the taking of new notes and mortgage for the balance, does not of itself discharge the lien of the first mortgage. But this would be otherwise if the indebtedness secured by the second mortgage was created by the parties getting together and having a settlement of mutual running accounts and other debts, among which was the first mortgage debt, and a balance is found due the plaintiff. This balance being put in a new note and mortgage would form a new consideration, and the lien of the first mortgage be divested. But where there is an express agreement that the mortgage, under such circumstances, shall continue as a security, the lien of the first mortgage is not destroyed.

In *Burns* v. *Thayer*, it was held that, where a husband gave a mortgage for the purchase money of real estate, and this mortgage was afterwards discharged, and at the same time and as a part of the same transaction a new note and mortgage were given for the same purchase-money debt, the instantaneous seisin of the husband did not operate to give the wife a homestead in the premises.

A mortgage secures a debt or obligation and not the evidence of it, and no change in its form will discharge the mortgage. Whether a new mortgage, given in the place of an old one, shall be treated as a payment of the one for which it was substituted, will depend upon the purpose and understanding of the parties to the transaction. But not only will the intention of the parties be determined by the express agreement, but, in the absence of such, by the circumstances attending the transaction, from which such intention may be inferred. The court, in *Swift* v. *Kreamer*, says: "We regard the cancellation of the old mortgage and the substitution of the new as cotemporance acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity looking to the substance of such a transaction would not permit a release intended to be effected only by force of, and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage were inoperative."

A mortgagee who takes a new mortgage from the grantee of his mortgagor in the place of the old one, does not lose his priority over judgment liens existing subsequent to the date of the old mortgage. If a mortgagee release his mortgage and accept a new mortgage, without knowing of the existence of a second mortgage, the second mortgagee will not be allowed to avail himself of the advantage thus gained; and the law will uphold a mortgage lien in favour of a mortgage against an intervening title, even where the parties had undertaken to discharge the mortgage, unless injustice would be done thereby. And thus a mortgagee lien, purchased by the owner of the equity of redemption, will, in the absence of a contrary intention manifest to the court, be kept alive in equity for the purchaser's protection against an intervening incumbrance.

In *Rump* v. *Gerkens*, the plaintiff released his mortgage, not knowing of a junior mortgagee, and the court say, that such did

not extinguish the lien of the first mortgage, so that he (the plaintiff) could not use it as a protection to his right against the subsequent mortgage. "In other words, a court of equity will regard it as still existing as a lien and not having merged, so as to protect him against the subsequent mortgage, . . . In law a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and in the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would exist at law, and sometimes preserve it where at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united."

A mortgagor, for his own advantage, yet in good faith, procures satisfaction pieces from his mortgagee, and cancels the mortgages without paying the mortgage money, and does so upon an understanding to give new mortgage, but dies without accomplishing it, and his heirs after him give such new mortgage: *held*, that the new mortgage executed by the heirs should have the same effect as the old securities.

Contrary Doctrine.—A rule contrary to the one above maintained is steadily followed by the courts of Maryland, and, as far as we are able to discover, that State is alone in its position. It is there said that the release of one mortgage and the giving of another on the same property, for the same debt to the same mortgage, does not avoid the loss of the first mortgage lien by the release, and although the only consideration for the release is the simultaneous execution of another mortgage to the same tenor and effect as the released mortgage.—*Central Law Journal.*

[The authorities will be found on reference to the above publication, vol. 23, p. 579.]

REPORTS.

MUNICIPAL CASE.

BAGGS V. CITY OF TORONTO.

Surface water—Raising grade of street—Flooding of adjacent land—Note—Liability of corporation.

B., residing on Lippincott Street, Toronto, had his premises flooded by surface water flowing into his cellar after a storm. The flooding was greater owing to the raising of the grade of Lippincott Street by the defendants block-paving same.

Held, That right of drainage does not exist *jure naturæ*. That the defendants were not liable for the damage claimed, as they had only exercised a legal power vested in them by statute to raise the grade of the street, and block-pave same; they had been guilty of no negligence, and were not bound to provide drainage for surface water.

[County Court, Co. of York—Toronto, 1886.

The plaintiff claimed damages from the defendants in this proceeding for the flooding of his cellar and premises on Lippincott Street, in the City of Toronto.

Heighington, for plaintiff.

McWilliams, for defendants.

The facts, as disclosed in evidence, are set ou in the judgment of

MCDOUGALL, Co.J.—Lippincott St. runs north and south. The natural fall of the land from Bloor St. is from the north to the south-west; and it appears that, prior to the doing by the defendants of any of the acts complained of, the surface water collected on the lands to the north and north-east of the plaintiff's property, flowed in times of heavy rains or freshets in a southerly and westerly direction partly across the line of Lippincott Street and partly across the plaintiff's land, then south-westerly till they found their way into certain natural watercourses west on Bathurst Street.

The plaintiff admits that on former occasions in times of heavy freshets he had been flooded by surface water, but said that by reason of the side ditches on Lennox Street, a street running east and west, and north of his premises, (which ditches were cut through and across the line of Lippincott Street) a good deal of the surface water was intercepted before reaching him, and transferred and discharged upon the lands lying west of Lippincott Street, though in times of heavy freshets even this diversion did not protect him, and his premises suffered more or less. In May, 1885, the defendants block-paved Lippincott Street. In doing so the grade of the street was necessarily raised. Prior to block-paving, some years, a sewer had been put down on the street, and,

after raising the grade and block-paving, two culverts or man-holes were put down on the east side of Lippincott Street at the north-east and south-east corners of Lennox Street. The effect of raising the grade on Lippincott Street was to prevent the flow of surface water across the street; and the result was that when freshets or very heavy rains occurred a considerable portion of the surface water, which the culverts at Lennox Street were inadequate to carry off, flowed down the east side of Lippincott Street and through and over the plaintiff's lot, some finding its way into his cellar and filling it up, and more flowing under the plaintiff's house, and then easterly till absorbed at other points. The plaintiff alleges that his building was seriously injured, and about a foot of rubbish and mud deposited in his cellar, which he had to remove at some expense. Other injuries also resulted to his building, which he alleges arose in consequence of this flooding. The worst flood was one occurring on the 3rd and 4th January, 1886, when there was a very heavy downpour for several days, resulting in the flooding of the natural water-courses in the west end of the city, and in overcharging all the sewers in this vicinity. A flood also occurred in 1885 about the time of the construction of the block-paving, and another in March, 1886. The latter was not so serious as the January one, which, according to the evidence, was much the heaviest of the three. The plaintiff also states that the March flood was less injurious to him, because the defendants had put in some additional culverts at Bloor Street, these taking off a quantity of the surface water coming down from the north, and discharging it into sewers on Borden Street and Brunswick Avenue, streets parallel to Lippincott Street and to the east of it. *All the injuries the plaintiff complains of were the result of flooding by surface water, and did not arise from the overflow of the sewer.*

The defendants urge that they are not legally responsible for the damages in question on two grounds: first, they say, We are not bound to protect you from injury from surface water; and second, they say that the plaintiff was flooded by surface water before they graded this street and if, as a fact, it appears that the flooding is any more extensive by reason of their having raised the grade of the street, they contend that they are not responsible, because, in raising the grade in order to block-pave, it was the proper exercise of a legal power by the corporation, and they have not exceeded these powers, nor have they been guilty of any negligence in their mode of exercising them.

On the first point there is no doubt whatever that the defendants are right. The right of drainage does not exist *jure naturæ*. The principles applicable to running water which are *publici juris* do not extend to the flow of mere surface water. *McGillivray* v. *Millin*, 27 U.C.R. 62; *Crewson* v. *Grand Trunk*, 27 U.C.R. 68; *Murray* v. *Dawson*, 19 U.C.C.P. 314; *Darby* v. *Crowland*, 38 U.C.R. 338. Dillon on Corporations, second ed., par. 798.

The second point, however, as to whether a corporation, raising a grade of a street and thereby preventing the escape of surface water from one side of the street to the other, and causing damage to an adjacent proprietor, is liable, is perhaps not so free from doubt. The case most in point that I have been able to find is *Darby* v. *Crowland*, 38 U.C.R. 338. The facts in that case, as stated in the head-note, are as follows: There had for many years been a culvert across a highway adjoining the plaintiff's land, through which the surface water from his land had been accustomed to pass, and the pathmaster had closed it up and made the road-bed solid, by which the flow of surface water from the plaintiff's land was impeded, and the land remained longer wet than it would otherwise have done. The corporation by resolution approved of the pathmaster's action. It was there held that the plaintiff had no cause of action, for there was no right of drainage across the highway for the surface water, and the corporation could not be liable for not exercising their discretionary powers with regard to the drainage of lands.

The numerous cases cited in that judgment show that both in England and the United States it has been distinctly decided, as I have before said, that the right of drainage of surface water does not exist *jure naturæ*, and that long enjoyment of the right would not create an easement. Chief Justice Harrison, after affirming this proposition of law, adds: "The fact that the defendants are a municipal corporation cannot give to the plaintiff any greater rights than he would have against the private individual. It is true that municipal corporations have power, under certain circumstances, to pass by-laws for the drainage of lands; but this, like many other powers conferred on municipal bodies, is a discretionary, not an obligatory, power." In Dillon on Corporations, paragraph 798, the law is laid down as follows: "Authority to establish grades of streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may injuriously affect the adjacent property owners; but where the power is not exceeded there is no liability unless created by statute, and then only in the mode and to the extent provided for the consequences resulting from its being exercised and properly carried into execution. On the one hand, the

owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property."

The principle is well settled, that a corporation is not liable to an action for consequential damages to private property or persons unless it be given by statute, where the act complained of was done by it under and pursuant to authority conferred by an Act of the Legislature, and there has been no want of reasonable skill in the execution of the power: *Mersey Dock Cases*, 11 H. of L. Cases, 713. Adjoining property owners are not entitled of legal right, without statutory aid, to compensation for damages which result as an incident or consequence of the exercise of this power by the municipality by authority from the legislature. If we examine the statutory provision made by our legislature when conferring the many extensive powers vested in municipal corporations, and which provisions direct how and under what circumstances compensation is to be made to persons injuriously affected by the exercise of those powers. we will find them as follows, section 486 of 46 Vict. chap. 18, Ontario, enacts: "Every Council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or *injuriously affected by the exercise of its powers*, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act." Compensation is here provided in respect of all acts by which lands are *injuriously affected*. These words, however, have been held, by a long series of decisions of the highest authority, to embrace only such damages as would have been actionable if the work causing it had been executed without statutable authority. *Re Collins* v. *Water Commissioners of Ottawa*, 42 U.C.R 378; *Re Penny*, 7 Ell. & B. 660; *Rickett* v. *The Metropolitan R. R. Co.*, L. R. 2 E. & I. Appeals 175; *Buccleuch* v. *The Metropolitan Board of Works*, L. R. 5 E. & I. App. 418; *McCarthy* v. *The Metropolitan Board of Works*, L. R. 7 E. & I. App. 243.

The law largely regards surface water as a common enemy (as Lord Tenterden phrases it), which every proprietor may get rid of as best he may and as said by Mr. Dillon in the passage before quoted by me: "The owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise these powers in respect to graduation, improvement and repair of streets without being liable for the consequential damages caused by surface water to adjacent property." Had the defendants raised the grade of this road without statutory authority, they would not then have been liable for the interruption of the flow of the surface water, there being no right of action before the passage of the Act directing compensation to be made in cases where lands were injuriously affected. Under the decisions last referred to, no legal claim for damages can be successfully established or maintained. In *McCarthy* v. *The Metropolitan Board of Works*, above cited, Lord Hatherly uses the following language: "I believe the rule to be a sound one, that wherever an action might have been brought for damages, if no Act of Parliament had been passed, the case is brought within the class of cases in which a property is injuriously affected within the meaning of the Act." And Lord Penzance in the same cases thus clearly expresses his conclusion: "It may reasonably be inferred that the Legislature, in authorizing the works and thus taking away any rights of action which the owner of land would have had if the works had been constructed by his neighbour, intended to confer on such owner a right to compensation co-extensive with the right of action of which the statute had deprived him; but on no reasonable grounds, as it seems to me, can it be inferred that the Legislature intended to do more, and actually improve the position of the person injured by the passing of the Act."

I have examined with care the cases cited to me by Mr. Heighington, but I can find in them no authority which in the least impeaches these doctrines. I am, therefore, compelled to hold that the plaintiff has not established before me any claim for damages resulting from the acts of the defendants in raising the grade of Lippincott Street, for which, under the cases, he is entitled to recover against them any sum whatever.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

British Columbia.]

CANADIAN PACIFIC RAILWAY CO. v. MAJOR.

Canadian Pacific Railway Act, 44 Vict. ch. 1—Consolidated Railway Act, 1879, s. 19.

By the Act incorporating the Canadian Pacific Railway Co., 44 Vict. ch. 1, the provisions of the Consolidated Railway Act, 1879 are made applicable to the building of the Canadian Pacific Railway, in so far as they are not inconsistent with or contrary to the said act of incorporation.

Held, (HENRY, J., dissenting), that the provision contained in section 19 of the Consolidated Railway Act, 1879, that no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special act, is inconsistent with the power given to the company under sec. 14 of the contract contained in said Act to build branch lines from any point within the Dominion, and with the declaration in section 15 of the charter that the main line, branch lines, and any extension of the main line thereafter constructed or acquired shall constitute the Canadian Pacific Railway.

The Canadian Pacific Railway has, therefore, a right to build their road beyond Port Moody in British Columbia, the terminus mentioned in said Act of incorporation.

Appeal allowed with costs.

Robinson, Q.C., *and Tait*, Q.C., for appellants.

Ebert, for respondent.

EXCHEQUER COURT OF CANADA.

BERLINQUET v. THE QUEEN.

Petition of right—Intercolonial Railway contract—31 Vict. ch. 13, s. 18—Certificate of engineer—Condition precedent to recover money for extra work—Forfeiture and penalty clauses

The suppliants engaged by contracts under seal dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vict. ch. 13) to build, construct and complete sections 3 and 6 of the said railway for a lump sum for section 3 of $462,444, and for section 6 for a lump sum of $456,946.23.

The contract provided, *inter alia*, 1. That it should be distinctly understood, intended and agreed, that the said lump sums should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contracts, or which might be required in virtue of any of its provisions, or by law, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of the exercise of any of the powers vested in the Governor in Council by the said Act intituled, "An act respecting the construction of the Intercolonial Railway," or in the commissioners or engineer by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the said contract, relating to alteration in the grade or line of location; and that the said contract and the said specifications should be in all respects subject to the provisions of 31 Vict. ch. 13. That the works embraced in the contracts should be fully and entirely completed in every particular and given up under final certificates and to the satisfaction of the commissioners and engineer on the 1st of July, 1871 (time being declared to be material and of the essence of the contract), and in default of such completion contractors should forfeit all right, claim, etc., to

any money due or percentage agreed to be retained and to pay as liquidated damage $2,000 for each and every week for the time the work might remain uncompleted. That the commissioners upon giving seven clear days' notice if the works were not progressing, so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors, and complete the works at their expense; in such a case contractors were to forfeit all right to money due on the works, and to the percentage returned.

On 24th May, 1873, the contractors sent to the commissioners of the Intercolonial, a statement of claims showing that there was due to them a large sum of money for extra work, and that until a satisfactory arrangement be arrived at they would be unable to proceed and complete the works.

Thereupon, notices were served upon them, and the contracts were taken out of their hands and completed at the cost of contractors by the Government.

In 1876 the contractors by petition of right, claimed $523,000 for money *bona fide* paid, laid out and expended in and about the building, and construction of said sections 3 and 6 under the circumstances detailed in their petition.

The Crown denied the allegations of petition, and pleaded that the suppliants were not entitled to any payment, except on the certificate of the engineer, and that the suppliants had been paid all that they obtained the engineer's certificate for, and in addition filed a counter claim for a sum of $159,982.57, as being due to the Crown under the terms of the contract for moneys expended by the commissioners over and above the bulk sum of the contract in completing of said sections.

The case was tried in the Exchequer Court by TASCHEREAU, J., and he held that under the terms of the contract the only sum for which the suppliants might be entitled to relief, were 1st, $5,850.00 for interest upon, and for the forbearance of divers large sums of money due and payable to them, and 2ndly, $27,022.58, the value of plant and materials left with the Government, but that these sums were forfeited under the terms of the third clause of the contract; that no claim could be entertained for extra work without the certificate of the engineer, and that the Crown were entitled to the sum of $159,953.51 as being the amount expended.

An appeal to the Supreme Court of Canada having been taken by the suppliant, it was

Held (affirming the judgment of the court below), FOURNIER and HENRY, JJ., dissenting. 1. That by their contract the suppliants had waived all claim for payment of extra work; and 2. That the contractors not having previously obtained from or being entitled to a certificate from the chief engineer as provided in the 18th sec. 31 Vict. ch. 13, for or on account of the moneys which they claimed, the petition of the suppliants was properly dismissed. 3. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors, and charge them with the extra cost for completing the same, but that in making up that amount the court below should have deducted the sum awarded as being the value of the plant and materials taken over from the contractors by the commissioners in June, 1873.

Appeal dismissed with costs.

Irvine, Q.C., and *Girouard*, Q.C., for appellants.

Burbidge, Q.C., and *Ferguson*, Q.C., for respondents.

CHANCERY DIVISION.

Ferguson, J.] [Nov. 8.

JENKINS v. DRUMMOND ET AL.

Will—Devise to children—Period of division—Who entitled.

S. P., by her will, provided as follows: "Also I will and ordain that my said property, after the death of my before mentioned daughters, E. O. W. and S. A. W., be sold, . . . and the proceeds . . . be divided between the children of my daughters, E. O. W., M. K., and S. A. W. . . . one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and

share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds . . . be equally divided between the two remaining families, the children of each family receiving share and share alike of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix. S. A. W. survived E. O. W., and died in 1886, many years after the death of the testatrix. All three of the said children of M. K. predeceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived M. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her.

Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. O. W. and M. A. W. then living were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety.

Geo. M. Evans, for the plaintiff.

Walkem, Q.C., for the children.

Delamere, for the grandchildren.

Boyd, C.] [Nov. 30.

WYLD ET AL. v. CLARKSON.

Guarantee—Creditors' right to rank on two estates in hands of assignees—Valuing security—48 Vict. c. 26 (O.).

The plaintiffs supplied B. with goods on the guarantee of M. M. made an assignment for the benefit of creditors under 48 Vict. c. 26 (O.), on March 20, 1886. B. assigned in like manner on March 30, 1886. On April 6 the plaintiffs proved their claim for the full amount on M.'s estate, and stated that they held as security their claim against B.'s estate, but did not value it. On April 8 B. effected a compromise with creditors at fifty cents on the dollar, and gave composition notes therefor. The defendant, M.'s assignee, claimed that the plaintiffs should value their security, and refused to pay their dividend until they did. Upon a special case being stated for the opinion of the court, it was

Held that by B.'s assignment her estate was placed in *custodia legis*, protected from judgments and executions, and available for the creditors who were thus potentially seized of their proper proportion of the assets. The original personal claim was thus transmuted into a claim *in rem*, and so could fairly be regarded as in the nature of a security which the plaintiffs were bound to value.

Geo. Kerr, Jr., for the plaintiffs.

Foy, Q.C., for the defendant.

Boyd, C.] [Nov. 30.

MUTTLEBURY v. STEVENS.

Mortgage—Foreclosure—Rate of interest for time given for redemption.

M. took proceedings to foreclose a mortgage made by S. on which the principal money had become due by default being made in the payment of interest, although the time for which the mortgage was made had not arrived.

Held, that the rate of interest for the six months allowed to S. to redeem should be computed at the same rate as the mortgage provided for, which, in this case, seemed a reasonable rate.

F. E. Hodgins, for the plaintiff.

Divisional Court.] [Dec. 6.

THOMPSON ET AL. v. GORE ET AL.

Marriage settlement—Fraud on creditors.

The judgment of O'CONNOR, J., affirmed.

Lount, Q.C., and *Marsh*, for defendant, Jane Gore.

Falconbridge, Q.C., for defendants, Brydon and James Gore.

G. T. Blackstock, and *T. P. Galt*, for plaintiffs.

PRACTICE.

Wilson, C.J.] [October 29.

REGINA v. MEYER.

Criminal law—Refusing to provide for wife and children—Defendant a competent witness on his own behalf before a magistrate—Magistrates' powers and duties—32 & 33 Vict. ch. 20, sec. 25 (D.)—49 Vict. ch. 51, sec. 1 (D.).

Under 32 & 33 Vict. ch. 20, sec. 25 (D.), as amended by 49 Vict. ch. 5, sec. 1 (D.), defendant was charged by his wife, before a magistrate, with refusing to provide necessary food, clothing and lodging for herself and children. At the close of the case for the prosecution defendant was tendered as a witness in his own behalf. The magistrate refused to hear his evidence, not because he was the defendant, but because he did not wish to hear evidence for the defence; and subsequently, without further evidence, committed him for trial.

Held, that the defendant's evidence should have been taken for the defence; that a magistrate is bound to accept such evidence in cases of this kind, and give it such weight as he thinks proper, and that the exercise of his discretion to the contrary is open to review and correction.

Held, also, that the amended section of the Act is intended to enlarge the powers and duties of magistrates in cases of this nature, and that the word "prosecution" therein includes the proceedings before magistrates as well as before a higher court.

King (Berlin), for defendant.

E. F. B. Johnston, for the Attorney-General.

Mr. Dalton, Q.C.] [Dec. 7.
Galt, J.] [Dec. 14.

BURGESS v. CONWAY.

Appeal bond, liability on, after appeal allowed—Further appeal pending—Motion, notice of.

A judgment by the Court of Appeal in favour of a defendant appellant puts an end to all liability upon the appeal bond, which may, after such judgment, be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada. Notice should be given to the opposite party of a motion to take the appeal bond off the files.

Aylesworth, for the plaintiff.

George Kerr, for the defendant.

Mr. Dalton, Q.C.] [Dec. 8.

DART v. CITIZENS' INSURANCE CO.

Defence—Jurisdiction—Service—Appearance.

The defendants appeared to the writ of summons, and set up in the statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London.

Held, that there was nothing in these facts to show want of jurisdiction, and that the appearance had precluded all question as to the sufficiency of the service.

Rae, for the plaintiff.

Aylesworth, for the defendants.

Mr. Dalton, Q.C.] [December 20.
Armour, J.] [December 21.

MACGREGOR v. MCDONALD ET AL.

Disobeying order—Contempt—Appeal—Staying proceedings.

A party who has been ordered by the court to attend for further examination, after a refusal to answer questions, is in contempt if he does not so attend, but that is not a bar to his appealing from the order. Proceedings under the order will not be stayed pending the appeal.

MacGregor, for the plaintiff.

H. Cassels, for the defendant

Boyd, C.] [Dec. 23.

SHEPHERD v. THE CANADIAN PACIFIC RAILWAY CO.

Award, appeal from—Time—Filing—R. S. O. c. 50, secs. 191, 192, 193.

In the case of a voluntary submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. ch. 50, secs. 191, 192 and 193, and the time for appealing from the award runs from the date of filing.

McEdwan v. *McLeod*, 46 U. C. R. 235, followed.

A. H. Marsh, for plaintiff.

George Macdonald, for defendants.

Q. B. Divisional Court.] [December 23.

RE WALSH v. ELLIOTT.

Division Court—Jurisdiction—Liquidated and unliquidated amounts.

The decision of WILSON, C.J., 22 C. L. J. 387, was reversed on appeal.

J. B. Clarke, for appeal.

Shepley, contra.

Q. B. Divisional Court.] [December 23.

GORDON v. PHILLIPS.

Discovery—Rule 285—Discretion—Information for purpose of pleading.

The plaintiff had a good cause of action but was unable to frame his statement of claim without first examining the defendant and another.

Held, that he was entitled to such discovery under Rule 285, O. J. A., and that a local judge had exercised a proper discretion in granting it.

Osler, Q.C., for the plaintiff.

A. H. Marsh, for the defendant.

C. P. Divisional Court.] [December 24.

TOMLINSON ET AL. v. NORTHERN R. W. Co.

Costs—Third party—Appeal—Discretion—Sec. 32, O. J. A.

Held, that the order of ARMOUR, J., *ante* p. 419, refusing the third parties their costs, was made in the exercise of a discretion, which by sec. 32, O. J. A., was not subject to review, without leave, and, as no such leave had been given, an appeal from the order was dismissed with costs.

The court directed that such costs as had been incurred by the third parties in establishing the defence which might properly have been incurred by the defendants, should be allowed by the taxing officer.

W. H. P. Clement, for the plaintiffs.

Boulton, Q.C., for the defendants.

Tilt, Q.C., for the third parties.

C. P. Divisional Court.] [December 24.

STEWART v. SULLIVAN.

Staying proceedings—Interlocutory costs—Default—Practice in equity and at common law.

In equity, if interlocutory costs payable by the plaintiff remained unpaid, the court might, but was not bound to stay proceedings, and would not if it were not equitable to do so.

At common law, while non-payment of such costs was not a ground for staying proceedings, yet if it appeared equitable to stay procesdings until they were paid the court in the exercise of its inherent jurisdiction might direct a stay. The common law practice is the more convenient one, and should now be followed.

And where the plaintiff served in succession four notices of trial for the same assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid.

Aylesworth, for the plaintiff.

McIntyre, Q.C., for the defendant.

FLOTSAM AND JETSAM.

ANGLO-AMERICAN LAW SCHOOL OF JAPAN.—The mere fact of the existence of an Anglo-American law school in the remote country of Japan will have a curious interest for American lawyers. We may therefore be pardoned for reprinting at length the speeches which were made at the annual banquet of that law school, which took place in February last at Tokio, the capital of Japan. We take leave to premise by saying that some inquiry into the laws and habits of the people of Japan, prior to the time when the country was, through the intervention of the United States, opened to commercial intercourse with foreigners, leads us to doubt whether her municipal institutions will be improved by the introduction, or even by the study, of Anglo-American law. Contact with the Western nations will, of course, lead to changes in some features, such as the abolition of the practice of torturing prisoners in order to procure a confession; but we should sincerely hope that the Japanese will never go to the other extreme by adopting the rule of Anglo-American jurisprudence, *nemo seipsum accusare tenetur*, which in its full length and breadth prevents the officers of justice from interrogating the accused person on trial, who of all others knows best the essential fact whether he is guilty or not guilty. We also understand that the land laws of Japan and her political institutions are founded upon a system resembling the feudal system which prevailed in Europe at the close of the Middle Ages; but we should hope that the lawyers of Japan will not make the attempt of improving this system, however bad it may be, by introducing the English law of real property. We furnish a specimen of that law in another portion of this issue of the *American Law Review*, in the form of an able and well considered essay on the meaning of the legal term "privity of estate"; and, after reading that essay carefully and racking our recollection for what else we have learned upon that subject, we undertake to say now that no lawyer lives or ever has lived who could tell what is meant by privity of estate or who could with any certainty forecast the meaning which a court of justice will put upon the term in many common cases. The English law of real property is an agglomeration of monstrosities possessing about the same resemblance to rules of simple reason that a "Japanese mermaid," which consists of the stuffed head and bust of a monkey, joined to the stuffed tail of a fish in a manner so dexterous that no one without the aid of a minute search can detect the manner in which the joining process had taken place, bears to any created being. Not only the English law of real property, but much of the rest of the so-called "wisdom of ages," of which the common law is supposed to be the result, possesses just about as much congruity as this "Japanese mermaid," or as an entomological collection which some very shrewd and thrifty Japanese imposed upon a friend of ours, by joining with great skill, by means of fine threads of silk and lacquer, the bodies, limbs and wings of different members of the insect family. This collection our friend, in the simplicity of his heart forwarded to the late Prof. Agassiz, by whom he had been commissioned to make it; and when the specimens were exposed before the Cambridge professors, there was no bound to the surprise and delight which they produced. Then, according to the usual method where the collector has not proceeded in the most scientific manner, they undertook to apply steam to the different insects in order to render them flexible and get them into proper shape; when lo, the most wonderful specimens in the collection immediately fell to pieces! The common law, fitted to the institutions of Japan, would produce incongruities of a similar character. Milton did not describe a worse monstrosity in the lines, "Dagon his name, sea-monster, upward man and downward fish."—*American Law Review*.

THE CASE OF THE PREHISTORIC SHIP.—If a tenant in digging upon his land comes upon a prehistoric ship embedded in it, what and whose is it? Is it his, or his landlord's? Is he to boast not only of the discovery, but of the possession: or is he, like the hapless finder of "treasure trove," forced to deliver it up to some one else? Such was the question decided yesterday by Mr. Justice Chitty, the Judge who is so fortunate as to have before him all the odd, out-of-the-way cases, the cases unprovided for by rule or precedent. The matter at issue was the prehistoric ship which, as was described in our columns at the time, was discovered last April in a field at Brigg in Lincolnshire; and the suit of *Elwes* v. *The Brigg Gas Company* was brought to determine whether the landlord or the persons who made the discovery were the owners of the extraordinary vessel. It cannot be said that the case is of direct interest to large numbers of people, for prehistoric ships are not dug up every day; but in itself it was a problem that puzzled and interested the lawyers, and Mr. Justice Chitty was excusable in taking time to consider his

judgment. He doubted, as well he might, under what legal category the strange "find" was to be classed; but there is no doubt at all as to the interest and the extraordinary character of the vessel, archæologically speaking. As our correspondent, Mr. Stevenson, described it at the time, the boat is cut out of a solid block of oak, and is 48 feet long, 4ft. 4in. wide, and 2ft. 9in. deep. "The tree," he wrote, "is the finest stick of oak I have ever seen, and there is no tree growing in England to-day that is its equal." It is so straight and of such large size that it must have grown in some forest where the soil was highly favourable; while to choose such a tree and to be able to work it into the shape of a vessel shows that the primitive Britons who formed it were very capable and ambitious workmen. The head is rounded off. The sides are sloped or bevelled; there are marks where some kind of a raised deck has been fitted in; and the floor is perfectly flat and level, and has evidently been shaped by men handy in the use of the axe or adze. It is very natural that so curious a relic should not be surrendered without an appeal to the law by either the finders or the owners of the land.

But when the lawyers got the matter in hand, it became difficult to see how the vessel was to be described and classified. Was it a mineral? for if so, the defendants' lease barred them from appropriating it. Was it a chattel? or did it come under the old legal maxim, *quicquid plantatur solo solo cedit?* In any of these three cases the landlord could claim it; but the defendants were naïvely anxious to have the ship regarded as "among the substances which the lessee was under obligations to excavate and get rid of." The defendants had the right of excavating to a depth of fifteen feet, and on the site so excavated they were to build their gas-works. It happened by the most extraordinary piece of luck that this unique vessel was found, buried four or five feet in the alluvial soil, on the very spot where they were to excavate; and they would of course desire that so curious a discovery should come to them, to be dealt with according to their good pleasure, and to their profit, just as they would deal with the clay. But then arose the questions which we have stated. Mr Romer, the plaintiff's counsel, would rather have liked to prove the ship to be a mineral; for why should a ship not fossilized differ essentially from the same fossilized? But if it was not a mineral, then either of the other alternatives would suit him equally well; as Mr. Justice Chitty agreed, in giving judgment in his favour. The Judge demurred to the idea of the boat being a mineral; it might not differ scientifically very much from the wood which has become coal by long burial, but there was no need to proclaim its identity with coal. In fact, the simplest and truest way of describing the boat was as a chattel; and as such it would come under the well-known principle which says, if a man finds money in a secret drawer of a bureau that he has purchased, the money, though the seller had not known of its existence, belongs to the seller. "Obviously the right of the original owner," said the Judge with admirable gravity, "cannot be established; it has for centuries been lost or barred." We shall never know even the name of the potentate whose men paddled him in state down the Humber in this compact vessel, this master-piece of primeval engineering, this "Great Harry of the ancient Britons," as Mr. Stevenson called it. But we know that for the present it belongs to the owner of the soil, and that the Brigg Gas Company must be content with the barren honour of having dug it up.

What is to be the future lot of the vessel was not a question for the court to decide; but we trust that Mr. Elwes, who has thought it worth while to go to law about the title to the vessel, will take all rational measures for preserving it. Such a block of oak is not very easy to move; and it may be that we shall have to content ourselves with the plan originally proposed—the plan of keeping it in a covered shed in the field where it was found. If, however, the situation allows it to be placed upon a raft, and floated down the Humber, there is no reason why so extraordinary a relic of a remote British past (as we assume it to be) should not be taken to Hull, or even to London, where thousands might see it. An ancient British boat excavated in Robinson Crusoe fashion from the trunk of an oak tree, is not quite as historically important as Cleopatra's Needle, and we do not claim for it the same adventures and the same honours. But it is important enough to be preserved with the greatest care, and to be housed, if possible, where students and scholars can see it without the necessity of a long journey to a remote Lincolnshire town. If this, however, is pronounced impossible, we trust that the newly-established owner will take the best scientific advice, and will at once adopt measures for securing his curious possession from the decay which, after its long burial, would be likely to invade it.—*London Times.*

OSGOODE HALL LIBRARY.

The following is a list of books received at the Library during the months of October, November and December, 1886:—

American Decisions, Digest of 1760-1854, San Francisco, 1886.
Archbold's Pleading and Evidence in Crim. Cases, 20th ed., London, 1886.
Adams' (H. C.) Glossary, vol. 1, A to Eyre, Albany, 1886.
Baily (W. H.) *Onus Probandi*, New York, 1886.
Beach (C. F.) on Contributory Negligence, New York, 1885.
Chancery Cases (Am. Reprint), New York, 1828.
Carleton (A. B.) on Homicide, Cincinnati, 1872.
Deering (J. H.) on Negligence, San Francisco, 1886.
Dewey (T. H.) Contracts for Future Delivery, etc., New York, 1886.
Danforth (H. G.), Wicks (R. B.) N. Y. Ct. Appeals Dg't, New York, 1886.
Digest American Decisions 1760-1854, San Francisco, 1886.
Fletcher (B.) on Dilapidations, London, 1883.
Foyster (J. A.) "Married Women Act, 1886," 2nd ed., London, 1886.
Hodgins Canada Franchise Act Amendment, Toronto, 1886.
Hodgins on Voters' Lists, 2nd ed., Toronto, 1886.
Morawetz (N.) on Private Corporations, 2nd ed., Boston, 1886.
Morgan (J. A.) Legal Maxims, 3rd ed., Cincinnati, 1878.
Newberry (J. S.) Admiralty Reports, vol. 1, New York, 1857.
North-Western Reporter Digest, vols. 1-20, St. Paul, 1886.
Ohio, Revised Statutes of, vols. 1, 2 and 3, Cincinnati, 1886.
Patents, Commissioner of, Annual Report, Washington, 1886.
Patterson (C. S.) Railway Accident Law, Philadelphia, 1886.
Pomeroy (J. N.) on International Law, Boston, 1886.
Pollock (F.) on Contracts, 2nd Am. from 4th Eng. ed., Cincinnati, 1885.
Randolph (J. F.) on Commercial Paper, 2 vols., Jersey City, 1886.
Salmon (Lucy M.) on Appointing Power of President U. S., New York, 1886.
Selwyn (A. R. C.) Catalogue Economic Minerals of Canada, London, 1886.
Sheldon (H. N.) on Subrogation, Boston, 1882.
Sinclair (J. S.) Division Ct. Act, Hamilton, 1886.
Saunders (T. W.) on Negligence, Cincinnati, 1872.
Thompson on Negligence, 2 vols., San Francisco, 1880.
Thompson on Homesteads and Exemptions, San Francisco, 1878.
Thring (Sir H.) on Joint Stock Companies, 4th ed., London, 1880.
Wald (G. H.) Pollock on Contracts, Cincinnati, 1885.
Watson (W. B.) Compendium of Equity, 2nd ed., London, 1886.
World's Industrial Exhibition Catalogue, Washington, 1886.

NEW VOLUME OF THE LIVING AGE.—With the first number in January, *Littell's Living Age* enters upon its one hundred and seventy-second volume. It is a magazine whose value constantly increases as the field of foreign periodical literature widens, and it has become fairly indispensable to the American reader. The first weekly number of the new year has the following table of contents:—Mobs and Revolutions, *Fortnightly Review;* A Secret Inheritance, by B. L. Farjeon, *English Illustrated Magazine;* Mrs. John Taylor of Norwich, *Macmillan;* A Siege Baby, by the author of "Bootles' Baby," etc., *English Illustrated Magazine;* France As It Is and Was, Government and Society, by a Parisian, *National Review;* Mohammedanism in Central Africa, *Contemporary Review;* A Pilgrimage to Selborne, *Leisure Hour;* together with choice poetry, etc. This, the first number of the new volume, is a good one with which to begin a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1886.

During this Term the following gentlemen were called to the Bar, namely:—*Sept. 6th*—John Murray Clarke (Honours and Gold Medal); William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, George Henry Kilimer, Francis Cockburn Powell, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Thomas Urquhart, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Johnson, William H Wardrope, Francis Edmund O'Flynn. *Sept. 7th*.—Thomas Joseph Blain (who passed his examination in Trinity Term, 1885), William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John Dowdall, John Carson, Richard Vanstone, George Edward Evans, Charles Bagot Jackes. William Hope Dean; and *Sept. 17th*, William Robert Smythe (who passed his examination in Hilary Term, 1886). The following gentlemen received Certificates of Fitness to practise as Solicitors, namely:—John Murray Clarke, George Hutchison Esten, Wm. Smith Ormiston, Wm. Chambers, Alex. McLean, Robt. George Code, Henry Smith Osler, Edward C. S. Huycke, Wm. John McWhinney, Wm. Murray Douglas, Chas. True Glass, Robt. Charles Donald, Herbert Mcdonald Mowat, Francis Edmund O'Flynn, Lawrence Heyden Baldwin, John Bell Dalzell, Lyman Lee, Augus McCrimmon, Ranald D. Gunn, Joseph Coulson Judd, Heber Hartley Dewart, John Wesley White, Alex. David Hardy, Wm. Mansfield Sinclair, Hubert Hamilton Macrae, John Geale (who passed his examination in Hilary Term, 1886, also received his Certificate of Fitness). The following were admitted into the Society as Students and Articled Clerks, namely:—

Graduates.—George Ross, John Simpson, George Wm. Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin Macdonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Roswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont, Charles Elliott.

Matriculants of Universities.—William Johnston, Samuel Edmund Lindsay, Nelson D Mills.

Junior Class.—Richard Clay Gillett, Alexander James Anderson, George Prior Deacon, Louis A. Smith, Andrew Robert Tufts, William Wright, Kenneth Hillyard Cameron, Harry Bivar Travers, John Alfred Webster, Thomas James McFarlen, William Elijah Coryell, John Henry Glass, Albert Henry Northey, Archibald Alexander Roberts, Charles B. Rae, George S. Kerr, William Egerton Lincolm Hunter, Francis Augustus Buttrey, Frederick Thomas Dixon, Hector Robert Argue Hunt, Daniel O'Brien, Franklin Crawford Cousins, Thomas Alexander Duff, William G. Bee, Stephen Thomas Evans, William Mott, Thomas Arthur Beament, and John Alexander Mather was allowed his examination as an Articled Clerk.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884.
- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.
- Xenophon, Anabasis. B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:
Hilary Term, first Monday in February, lasting two weeks.
Easter Term, third Monday in May, lasting three weeks.
Trinity Term, first Monday in September, lasting two weeks.
Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (vv. 1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

Canada Law Journal.

VOL. XXIII. JANUARY 15, 1887. No. 2.

DIARY FOR JANUARY.

15. Sat.....Last day for filing papers with Sec. L. S. before call or admission.
16. Sun.....*2nd Sunday after Epiphany.*
18. Tues...University graduate and matriculant seeking admission to L. S. to present papers; primary examination of students and articled clerks.
19. Wed ...Lord Langdale appointed M. R. 1836.
22. Sat.....Lord Bacon born 1561. Last day for filing papers for call or admission.
23. Sun.....*3rd Sunday after Epiphany.*
25. Tues...First intermediate examination.
26. Wed...Barristers' examination. Gen. Gordon killed, '85.
27. Thur...Second intermediate examination.
30. Sun.....*4th Sunday after Epiphany.*

TORONTO, JANUARY 15, 1887.

WE have been asked to call attention to the following petition, which has been for some time in circulation among members of the Bar in Toronto, and in various cities and towns throughout the country, and has, we are informed, already received a large number of signatures, and which it is proposed to present to the Benchers at one of their meetings in the beginning of February.

To the honourable the Benchers of the Law Society of Upper Canada.

The petition of the undersigned members of the Bar of Ontario, humbly sheweth:

1. That the present is the fiftieth year of the reign of her Majesty the Queen.

2. That your petitioners respectfully submit that it is right and proper that a public body, such as the Law Society of Upper Canada, should take some steps to commemorate the occasion.

3. That your petitioners would suggest that a suitable way of doing so would be the erection of a statue or bust of her Majesty to be placed in the Central Hall at Osgoode Hall or other suitable place within its precincts.

Your petitioners therefore pray that your honourable body will vote a sufficient sum out of the funds of the Law Society of Upper Canada for the erection of such a statue or bust, or will vote a liberal contribution towards such object, the balance to be collected by voluntary subscriptions amongst members of the legal profession in Ontario.

We have also been asked to state that it is, of course, impossible to submit the petition to every member of the Bar throughout the Province, and therefore, any who would wish their names to appear to it, are invited at once to enclose their signatures on a slip of paper with a letter under cover to the Editor of the CANADA LAW JOURNAL, authorizing the affixture of the signature to the petition.

We are very glad to do what we can to aid in promoting what we regard as a very excellent idea. In the first place, the erection of a statue or bust, as suggested in the petition, would be an outward and visible sign of the inward and spiritual loyalty to the British Crown, which we know to be a living feeling—and we hope an immortal feeling—in the breasts of Canadians. Take loyalty to the Crown away, and would not the Empire collapse and fall to pieces like a house of cards? Loyalty to the Crown is the very life of the Empire, and such a manifestation of it amongst us as is asked for by the above petitioners would be well timed in this the Jubilee Year of all true-hearted British subjects.

Apart from this, however, there could not be a more fitting depository for historical monuments of any kind than Osgoode Hall, and nothing more interesting as a historical monument could be suggested than a statue or bust of Queen Victoria.

The reign of Victoria may be said to be coincident with the growth of the British Empire, as we now understand it; and whatever may be the ultimate destiny of this country the statue or bust suggested would never lose its interest from the historical point of view.

We think we Torontonians are singularly poor in respect to historical monuments, and might with advantage have many more than we at present possess.

Thirdly, and from the lowest point of view, as an embellishment of Osgoode Hall itself there are many positions in which a good statue would be very acceptable and pleasing to the eye.

We feel convinced that if the Law Society accede to the prayer of the petition in a liberal manner, it will meet the approval of the vast majority of the members of the profession. There are, however, always some individual malcontents to find fault with anything that is suggested, but we trust that no fear of a possible grumble here or there will prevent the carrying out of a scheme which would certainly give gratification and pleasure to the vast majority.

THE LIMITATION OF CERTAIN ACTIONS.

One of the chief requisites in jurisprudence is that there should be *certainty* in the decisions of its courts and judges. And it has been said that even if a decision is wrong in principle, but at the same time well known and recognized, it is better that it should be so rather than hat there should be any uncertainty on the point decided.

We are not now about to make the Rule in Shelley's Case a text, upon which to preach a legal sermon. That case, so well fixed in the mind of every student of a couple of years' standing (owing, no doubt, to the difficulty that existed in getting it well established there in the first instance), is too old and respectable to be shaken by the assaults made upon it by divers judges in these modern days. The subject of our remarks is one of a more useful and practical character—and it is this—What is the effect of our statute (R. S. O. chap. 108) in its limitation of actions on mortgages, judgments, etc. ?

It will be at once answered, that the point has been already decided in two late cases in our own courts—*McDonald* v. *McDonald*, 11 O. R. 187, and *McDonald* v. *Elliott*, 12 O. R. 98; in the former of which Mr. Justice Proudfoot, and in the latter, Mr. Justice Rose, hold that a mortgagee is entitled to recover on his mortgage, though his action is brought after the expiry of the ten years limited in the above Act.

Both of these judges refuse to be bound by the late decisions in England—the very opposite of those just quoted—preferring to follow the older cases in our own Court of Appeal, viz.: *Allan* v. *McTavish*, 2 App. R. 278, and *Boice* v. *O'Loane*, 3 App. R. 167.

The English cases laying down the opposite view are *Sutton* v. *Sutton*, L. R. 22 Ch. D. 511, decided in the Court of Appeal, and *Fearnside* v. *Flint*, *id.* 579.

In his judgment, Mr. Justice Proudfoot gives as his reason for not following *Sutton* v. *Sutton*, in preference to *Allan* v. *McTavish*, that the English Court of Appeal (by which the former was decided) is not the Court of ultimate appeal for the Province (of Ontario); while *Allan* v. *McTavish* is (to use his own words) "the decision of the highest Appellate Court in the Province, to which an appeal lies from me."

Mr. Justice Rose, in *his* judgment, says he thinks he ought to follow the course followed by Mr. Justice Proudfoot; and later on he says: "I am further of opinion that in this case it may be well to allow our own Court of Appeal to say whether they will be satisfied to reverse the holding in *Allan* v. *McTavish*, and thus change the law of this Province, because of a subsequent judgment of the Court of Appeal in England. I do not feel warranted in endeavouring to antici-

pate their action when the point comes to be raised before them."

This apparently was not the line of reasoning followed by one of our County Court judges, in a case reported some years ago in our columns, where all the cases on the subject, English and Canadian, appear to be collected (*Somers* v. *Kenny*, 20 C. L. J. 7). In the judgment there reported, we find it said: "I am under the impression (whether rightly or wrongly I cannot say positively, as I have no means of informing myself on the point) that if *Allan* v. *McTavish*, or *Boice* v. *O'Loane*, were now to be brought before the Supreme Court here, that court would feel itself bound to override them, and follow *Sutton* v. *Sutton*. I think also that if the judgment I now give be appealed from, that the Court of Appeal would follow *Sutton* v. *Sutton*, and not deem itself bound by its previous judgments."

Strangely enough this case was cited by counsel on one side, in the late case of *Ross* v. *G. T. R.*, 10 O. R. 447, while *Sutton* v. *Sutton* was quoted by counsel on the opposite side.

That case (*Ross* v. *G. T. R.*) is one which might well be referred to here. It was an action for compensation for land taken by a railway, brought after the lapse of more than ten, but less than twenty years from the taking.

Mr. Justice Armour, in his judgment says: "It was argued that the plaintiff's claim to compensation was within R. S. O. ch. 108, sec. 23, and was money secured by lien or otherwise charged upon or payable out of land, and was therefore barred . . ." and it would appear that the learned judge might have thought himself bound to admit the force of this argument, as, to evade the effect of it, he presently goes on to say: "The plaintiff's right to compensation being a statutory right, an action to enforce it would, in my opinion, not be barred except by the lapse of twenty years after the cause of action arose, and this period had not elapsed when this action was brought."

It must then, for the present, at all events, be deemed settled that *Allan* v. *McTavish* and *Boice* v. *O'Loane* lay down the law as applicable to this Province, and that twenty years, and not *ten*, is the limit to actions of every sort on mortgages and judgments.

It will be observed that neither Mr. Justice Proudfoot nor Mr. Justice Rose pretend to consider the principle involved in these various cases. But it will be instructive for any one who desires to do so to read the judgments of Jessell, late M. R., in *Sutton* v. *Sutton*, and the late Chief Justice Moss, in *Boice* v. *O'Loane*, both of them judges of the highest distinction, who, in closely reasoned judgments, arrive at conclusions the very opposite of one another. It is remarkable, however, that in the latter case, Moss, C.J., approved of the reasoning of Mr. Justice Gwynne in the court below (and whose judgment the court above reversed), but said it was not consistent with *Hunter* v. *Nockolds*: 1 Mac. & G. 640.

We may add that *Allan* v. *McTavish* reversed the decision of Mr. Justice Morrison in the court below; and that in another case of *Caspar* v. *Keachie*, 41 U. C. R. 601, Mr. Justice Wilson (now Chief Justice) took the same view as Mr. Justice Gwynne and Mr. Justice Morrison.

This last case was never carried to appeal, though decided only a few months after *Allan* v. *McTavish* (in the court below), and about an equal time before *Boice* v. *O'Loane* (in the court below).

We have thus the judgments of Mr. Justice Gwynne, (the present) Chief Justice Wilson, and Mr. Justice Morrison all affirmed by the Court of Appeal in England; while, as has been said, the reasoning of Mr. Justice Gwynne was approved of by the Court of Appeal, though that

court felt itself bound to come to a different conclusion, owing to the case of *Hunter* v. *Nockolds*.

Here then the matter rests, as far as the state of the law on the point is concerned; but we would like to see some authoritative decision as to whether the decision of the Court of Appeal in England ought to be considered paramount to that of our Ontario Court of Appeal, or not. Looking at the language used in the case of *Trimble* v. *Hill*, L. R. 5 App. Cas. 342, one might almost conclude that it ought so to be considered. The appeal there was from a judgment of the Supreme Court of New South Wales, which court had refused to depart from a previous judgment of their own, construing a statute passed in the same terms as an Imperial Statute. The House of Lords held that the court below might well have yielded to the high authority of the Court of Appeal in England, by a judgment of which court all the courts in England are bound until a contrary determination has been arrived at by the House of Lords; and their lordships thought that in Colonies where a like enactment has been passed by the Legislature the Colonial Courts should also govern themselves by it.

From this it would appear that, where our statute is identical with the Imperial statute (except that *ten* years is substituted for *twelve*), if a like case to *Allan* v. *McTavish* were again to come before the Court of Appeal here, that court should be governed by *Sutton* v. *Sutton*, and not adhere to their previous decisions in *Allan* v. *McTavish* and *Boice* v. *O'Loane*.

RECENT ENGLISH DECISIONS.

The *Law Reports* for December comprise 17 Q. B. D. pp. 689-821; 11 P. D. pp. 125-186; 33 Chy. D. pp. 223-651; and 11 App. Cas. pp. 415-664.

TROVER—POST OFFICE ORDER CASHED THROUGH BANKERS.

Not many of the cases in the Queen's Bench Division are of much interest in this Province. *The Fine Art Society* v. *The Union Bank*, 17 Q. B. D. 705, is the first to claim attention. In this case the Court of Appeal determined that, where a post office order had been fraudulently deposited with a bank by a person not entitled thereto, the money for which was received by the bank, and placed to the credit of the person by whom the post office order had been deposited, the bank were liable to the rightful payee of the post office order for the money so obtained. The post office regulations provided that where a post office order is presented for payment by a banker, it should be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order is printed or stamped upon it; and it was held that this regulation did not give the post office order the character of a negotiable instrument transferable to bearer by delivery so as to bring the case within the doctrine of *Goodwin* v. *Robarts*, 1 App. Cas. 476.

NEW TRIAL—VERDICT AGAINST WEIGHT OF EVIDENCE.

In *Webster* v. *Friedeberg*, 17 Q. B. D. 736, the principle upon which the court should proceed in granting a new trial on the ground that the verdict is against the weight of evidence was again discussed, and is noteworthy for the fact that Lord Esher, M.R., makes a new and somewhat different proposal for the amendment of the rule laid down in *Solomon* v. *Bitton*, 8 Q. B. D. 176, from that suggested by Lord Halsbury in the late case of the *Metropolitan Ry. Co.* v. *Wright*, 11 App. Cas. 152 (noted *ante* p. 255). In *Solomon* v. *Bitton* it may be remembered that it is laid down by Jessel, M.R., that the question whether a new trial should be granted on the ground that the verdict is against the weight of evidence, depends upon whether the verdict is one which reasonable

men "ought to have come to." In *Metropolitan Ry. Co.* v. *Wright*, Lord Halsbury suggested that the question depends on whether the verdict is one which reasonable men "might have come to," and now Lord Esher, M.R., tells us on the authority of Fry, L.J., that what Jessel, M.R. really said was that the question depends on whether the verdict is one which reasonable men "ought *not* to have come to."

APPEAL — EXTENDING TIME — IGNORANCE OF SOLICITOR.

The *Queen* v. *Kettle*, 17 Q. B. D. 761, is another of those cases in which the court has refused to extend the time for appealing, where the time has elapsed owing to the ignorance of the practice of the appellant's solicitors. Wills, J., says at p. 763, after observing that the rule of practice under which the appellant ought to have proceeded had been in operation a month, that "the case falls within the category of ignorance of the law suggested by Baggallay, L.J., in *Collins* v. *Paddington Vestry*, 5 Q. B. D. 368. There is, as suggested in that case, a material distinction between a slip or mistake before and after judgment; and I feel the full force of the observation. There comes a time when everything must be final. Where judgment has been given, the successful litigant has a right to be protected against the too liberal indulgence of the court." Grantham, J., though agreeing that in the case before the court the leave should be refused, reserved his opinion as to the general rule to be observed in such cases.

LESSEE—COVENANT TO LEAVE IN REPAIR—MEASURE OF DAMAGES—INDEMNITY—BANKRUPTCY.

The action of *Morgan* v. *Hardy*, 17 Q. B. D. 770, was one by a landlord against the assignee of a lease to recover damages for breach of a covenant to leave the premises in repair at the end of the term. The defendant brought in a third party from whom he claimed indemnity. It appeared that, owing to changes in the surrounding property, the demised premises had so far altered in value since the commencement of the lease, that they would be as valuable for letting purposes if some of the repairs required by the covenant, according to its strict meaning, were either omitted or executed at a cheaper rate than was usual under such a covenant; but it was held by Denman, J., that the true measure of damages, notwithstanding the facts aforementioned, was the amount required to put the premises into such repair, as was originally contemplated by the covenant. As between the defendant and the third party, it appeared that the agreement for indemnity was made in 1873, and the third party became bankrupt in 1875, and that the term expired in 1883, and the third party sought to escape from liability on the ground that it was a claim discharged by his bankruptcy, but it was held that his liability under his agreement to indemnify the defendant against the covenant in question, was not "a liability present or future, certain or contingent" within s. 31 of the Bankruptcy Act, 1869, so as to be provable in bankruptcy, and therefore, that the bankruptcy proceedings were no defence.

NEGLIGENCE—CORPORATION PERFORMING PUBLIC DUTIES.

Gilbert v. *Corporation of Trinity House*, 17 Q. B. D. 795, is deserving of a passing word. By the Merchant Shipping Act, 1854, the superintendence and management of all lighthouses and beacons in England are vested in the defendants. The action was brought to recover damages for negligence committed by the defendants' servant, and the defendants endeavoured to escape from liability on the ground that the Act had constituted them servants of the Crown, so as to exempt them from liability in the same manner as the great officers of state are exempt, but Day and Wills, JJ., held this defence untenable.

HUSBAND AND WIFE—DIVORCE—REMARRIAGE OF GUILTY PARTY.

Turning now to the cases in the Probate Division, the first which claims attention is *Scott* v. *The Attorney-General*, 11 P. D. 128, in which the validity of the remarriage of a divorced person contracted under the following circumstances came in question: A. and B., both having an Irish domicil, were married in Ireland. They resided in Ireland a year after their marriage, and subsequently removed to the Cape of Good Hope, where the husband abandoned all idea of returning home, and visited England only for short periods. In the fifth year of cohabitation the wife committed adultery with S., whose domicil was English, and in a suit instituted by the husband against the wife in the court of the Cape of Good Hope, the marriage was dissolved. By the law of that colony, the guilty

party was not at liberty to remarry so long as the innocent party remained unmarried. The wife and S., shortly after the divorce, returned to England, and there went through the form of marriage according to law, whilst the innocent husband was still unmarried. It was held by Sir James Hannen that the divorce was valid, and that as the divorce had the effect of cancelling the existing marriage, the parties were restored to the condition of unmarried persons, and were at liberty to remove to England and contract a fresh marriage according to the law of England, notwithstanding the colonial law prohibiting the remarriage of a divorced person under such circumstances, and, that therefore, the marriage to S. was valid.

Cruelty—Condonation.

In *Mytton* v. *Mytton*, 11 P. D. 141, it was held that a persistent course of harsh, irritating conduct, unaccompanied by actual violence, but carried to such a point as to endanger the petitioner's health, and renewed after the resumption of interrupted cohabitation, constituted legal cruelty sufficient to justify a decree of judicial separation.

Probate—Two wills—Second action to establish a will—Staying proceedings.

Peters v. *Tilly*, 11 P. D. 145, was an action to obtain probate of a last will. There had been a previous action by the next of kin for letters of administration with the will annexed, bearing date 1868. In opposition, parties claiming to be legatees set up the contents of a late will, alleged to have been executed in 1877 or 1878, but which could not be found. The Probate Division held that the contents of this latter will had been proved, and granted probate, but the Court of Appeal reversed this decision, "without prejudice to any application for probate of the said will if found and produced," and this decision of the Court of Appeal was subsequently affirmed by the House of Lords. The present action was then brought for probate of the second will by the executor and residuary legatee thereunder, who had been the confidential solicitor for the deceased, and who had acted as solicitor for the legatees in the previous litigation. This suit was founded upon fresh evidence of the contents and execution of the second will. The defendant applied to stay the proceedings generally, and this Butt, J., declined to do, but inasmuch as the plaintiff had been privy to the prior suit, he ordered proceedings in this action to be stayed until the costs of the former suit should be paid.

Bill of lading—Perils of the sea—Burden of proof—Negligence.

The Xantho, 11 P. D. 170, was an action brought against a shipowner for the loss of goods carried under a bill of lading containing the usual exception against perils of the sea, it appeared that the goods were lost in consequence of a collision between the carrying ship and another, and it was held by the Court of Appeal that this was not *prima facie* evidence of a loss within the exception.

Mortgagee in possession—Account—Damage to mortgaged property.

Proceeding now to the cases in the Chancery Division, the first to which we would call attention is *Taylor* v. *Mostyn*, 33 Chy. D. 226. The plaintiffs in this case were mortgagees in possession of a colliery, and were also lessees of the same property under a lease by way of mortgage, for a fixed term of years at a rent and a certain royalty for all coal mined. The lease contained covenants to leave pillars of coal to support the roof, and not to work or remove the pillars. The mortgagees sublet, and gave their sub-lessees permission to work and remove the pillars which they did. In taking the mortgage accounts it was held that the mortgagees must be treated as having themselves wrongfully removed the pillars and must be charged, not with the amount of royalty reserved, but with the full value of the coal so taken, subject to a deduction for the cost of bringing it to the surface, but not for the cost of severance. Some time after the usual foreclosure judgment directing the accounts, it was discovered that the mines had been flooded in consequence, as the mortgagors alleged, of the improper working of the mines or the removal of the pillars by the sub-lessees. The mortgagors then applied to have an account taken of the damage thus occasioned, under the judgment as it stood, but it was held by the Court of Appeal that though the application was wrong in form, yet that the mortgagors were entitled to relief, and a supplemental order was made directing the account sought, and further directing that the

mortgagees should be charged with the amount of damages in the foreclosure account.

Easement—Building—Light and air—Prescription Act—2 & 3, W. IV. c. 71 (R.S.O. c. 108, s. 36).

The case of *Harris* v. *De Pinna*, 33 Chy. D. 238, turns upon the construction of the 2 & 3 W. IV., c. 71, s. 3 (R. S. O. c. 108, s. 36). The plaintiff brought the action to restrain the defendant from building so as to interfere with the access of light and air to the plaintiff's building in respect to which the plaintiff claimed to have acquired an easement over the defendant's premises. The building in respect of which the plaintiff claimed the easement was a skeleton structure used for storing and drying timber, which had openings at the sides through which light and air could enter, but these openings were from time to time blocked up by the timber stored. Chitty, J., was of opinion that the structure was not a "building" within the meaning of section 3 (R. S. O. c. 108, s. 36), and that the building intended by that section must be a building of a like character as a "dwelling house or workshop," and the Court of Appeal, without pronouncing on this point, were of the opinion that the plaintiff failed because he had failed to prove an uninterrupted access of light by any one aperture for the statutory period. It was further held by the Court of Appeal, on the authority of *Webb* v. *Bird*, 13 C.B.N.S. 841, that a right to the uninterrupted access of air over the general surface of the alleged servient tenement cannot be acquired under the Prescription Act; and the fact that the alleged servient and dominant tenements were both held under a common lessor, coupled with the fact that the lease of the servient tenement was earlier, negatived any claim to the easement as arising out of an implied covenant.

Solicitor and client—Costs—Taxation.

The principal point determined in *Re Hill*, 33 Chy. D. 266, was a question as to the costs taxable under an order directing the costs "properly incurred" by the plaintiff's solicitor in "recovering a fund" to be taxed; and it was held by the Court of Appeal (affirming Kay, J.,) that the costs incurred by the solicitor in establishing against the plaintiff his retainer as solicitor, upon an application made by the plaintiff to set aside the proceedings in which the fund was recovered, on the ground that the plaintiff had not retained the solicitor, were properly taxable; and also the costs of an appeal from the order by which the solicitor's retainer was established, which had come on and been dismissed after the making of the order for taxation.

Mortgagee in possession—Loss in management of mortgaged property.

Bompas v. *King*, 33 Chy. D. 279, was an action by a second mortgagee against the first mortgagee for an account of the proceeds of the sale of the mortgaged property, which consisted of a block of buildings let out as residential apartments to tenants, some of whom were supplied with food and attendance. The first mortgage contained a power to the mortgagee upon default to enter into possession and "manage" and receive the rents of the mortgaged property. Default having been made the first mortgagee entered and managed the property at a loss, and it was held by the Court of Appeal (affirming Kay, J.,) that the first mortgagees were entitled to be allowed the losses thus sustained out of the rents of the property, and, so far as they were deficient, out of the surplus proceeds of the sale.

Copyright—Registration of copyright.

In *Thomas* v. *Turner*, 33 Chy. D. 292, which was an action to restrain the infringement of a copyright, the Court of Appeal reversed the decision of Bacon, V.-C. The first edition o the plaintiff's book was published in November, 1881; neither this nor a second edition had been entered at Stationers' Hall before action, but the plaintiff had registered a third edition which was in fact a reprint of the first edition, describing it in the entry as the thir edition, and giving the time of the first publication as 22nd April, 1885, which was the date at which third edition was published. Bacon, V.-C., had held this to be a sufficient entry, but the Court of Appeal decided that the plaintiff had not truly stated the time of the first publication within the meaning of section 13 of the Copyright Act, 1842, and was consequently precluded by section 24 from maintaining the action.

Marriage settlement—After-acquired property.

In re Garnet, Robinson v. *Gandy*. 33 Chy. D. 300, the Court of Appeal reversed the decision of Kay, J., in 31 Chy. D. 648, noted *ante*, p. 203, holding that the setting aside of the re-

REPORTS.

COUNTY COURT OF THE COUNTY OF YORK.

HARRINGTON v. SAUNDERS.

Mechanic's lien—Failure of principal contractor—Ten per cent. lien postponed.

[McDougall, Co. J., 1886.

H., a material man, supplied S., a sub-contractor, with bricks for a building being erected for the owner by one B., under contract. A term of the contract was that if B. failed to complete the work properly the contract could be relet by the owner, and B., charged with the difference in the cost (if any). B., the contractor, made an assignment for the benefit of creditors, and abandoned the contract after doing about $770 worth of work, for which he had been paid $543. The work was relet, and completed at an increased cost to the owner of $360 over the original contract price.

Held, that H. took nothing under his lien, as the increased cost of completing the contract exceeded the difference between the value of the work actually done by B., the contractor, and the moneys paid thereon.

Query: Would this ruling apply to a lien for wages (45 Vict. Cap. 15 sec. 4):

This was an action upon a mechanic's lien, brought by a material man against a sub-contractor who purchased the material from him, and also against the principal contractor and the owner of the land.

The facts, which were undisputed, were as follows: The defendant, Baillie, contracted in writing to erect for the sum of $2,183, a building for the defendant, Hewlett; Baillie sub-let the masonry and brickwork to defendant, Saunders, at the contract price of $956. The defendant, Saunders, purchased and had delivered to him by the plaintiff, bricks to the value of $240, which went into the building. Baillie, after performing a portion of the work, became embarrassed, and made an assignment for the benefit of creditors.

Hewlett. the owner, under the terms of his contract with Baillie, advertised for tenders to complete the work, and relet the contract to his brother, who was the lowest tenderer.

The parties to this action for the purpose of this suit admitted the following figures to show the state of the account as regards all parties:—

Value of work done under contract by Baillie and Saunders, $770; amount paid thereon, $543. Increased cost to owner of completing the house beyond balance of original contract price with Baillie, $360. This was a direct loss suffered by the owner by reason of his (Baillie's) default. Last bricks delivered 6th January, 1886, lien filed 1st February and notice given Hewlett, the owner, on 1st February.

Dr. Snelling, for the plaintiff, contended upon the authority of *Re Cornish*, 6 O. R. 259, that the plaintiff was entitledto recover 10 per cent. of the value of the work done, viz.: $77 (10 per cent. upon $770), as the owner is bound to pay that amount, and that the fact of the owner being put to an extra outlay of$360 beyond the contract price could not affect the result.

McDOUGALL, Co. J.—The facts in this case bring it within the class of case suggested by the Chancellor in his judgment in *Re Cornish* (p. 265) and as to which he declines to express an opinion. He says: "It is not necessary to consider what would be the result if the contractor making default had occasioned damage to the owner above the balance of the contract price, a state of facts which is hinted at in sec. 4 of 45 Vict. cap. 15 (O.), but left for some future plaintiff to ascertain by the assistance of the courts."

In *Goddard* v. *Coulson*, 10 App. 1, a case very similar in its facts to this case, Mr. Justice Patterson holds that section 11, as amended by the Act of 1878, is only "to charge in favour of the mechanics, etc., 10 per cent, of the money which becomes payable by the owner to the principal contractor," and in the same case he holds that the mechanic cannot recover anything, because "the contract price agreed upon never became the price to be paid, because the contractor failed to do what was necessary to earn it or to earn more than he was in good faith actually paid, that amount being under 90 per cent."

The act of 1882 did not apply to *Goddard* v. *Coulson*, the litigation having arisen before the passing of that Act, but it does apply to the present case, Reading that statute as being a later expression of the legislative will, I am of opinion that section 4 of 45 Vict. cap. 15. (O.), favours the view that the Legislature regarded the 10 per cent. lien as postponed to an owner's claim for damages for a failure on the part of the contractor to complete his contract, and that in that view they thought it necessary to provide expressly for the lien of wages. Whether in the case of wages, even, they have successfully legislated an unfortunate owner out of 10 per cent. of a contract price, for which he never became indebted to the contractor, must be left to some future owner to have settled, but in the meantime, as to the claim of a material man (as he is styled in many cases), I am of opinion that in all cases where there has been a failure on the part of the principal contractor and the completion of his contract has

penses attending the execution of works authorized by the Act. (5) In repaying moneys due which had been or should be borrowed under the Act or any repealed act, was or was not pure personalty. Chitty, J. held that it was an interest in and affecting land, and therefore, within the meaning of the Mortmain Act, 9 Geo. II., c. 36; but the Court of Appeal reversed this decision, and in doing so distinguished the case from *Attorney-General* v. *Jones*, 1 Mac. & G. 574, threw doubt on the authority of *Knapp* v. *Williams*, 4 Ves. 430, etc., and refused to follow *Ion* v. *Ashton*, 28 Beav. 379.

TRUSTEE—INVESTMENT—HAZARDOUS SECURITY—CESTUI QUE TRUST—LIEN.

In re Whiteley, *Whiteley* v. *Learoyd*, 33 Chy. D. 347, the Court of Appeal affirmed the decision of Bacon, V.-C., noted *ante* p. 253. The court further decided that a *cestui que trust*, who has been paid the extra income secured by the investment of the trust funds in a hazardous security which ultimately proves deficient, cannot be compelled to refund to the trustee the excess of income thus obtained. The court also held that where a trustee has been ordered to replace a trust fund which has been invested on an insufficient security, the *cestui que trust* is entitled to a lien on the security until the fund is replaced.

TRADE MARK.

In re James's Trade Mark, *James* v. *Soulby*, 33 Chy. D. 392. The plaintiff, in 1861, registered a design for the shape of blocks of black lead, being a cylinder terminated by a dome at one end as a trade mark, and the question the Court of Appeal had to decide was whether Mr. Justice Pearson was right in saying that such a design could not be registered as a trade mark. This question they answered in the negative.

INFANT—MAINTENANCE—CHARGE ON INFANTS' ESTATE IN REMAINDER.

Cadman v. *Cadman*, 33 Chy. D. 397, was an application to raise money on infants' estates for their past and future maintenance. The infants, five in number, were entitled to successive estates tail in remainder expectant on the death of their grandmother, who was tenant for life, and there being no income available for their maintenance, the grandmother offered to release her life estate in a portion of the property so as to give the first tenant in tail an estate in possession for the purpose of raising money thereon, for the past and future support of himself and the other infants, but this the Court of Appeal refused to sanction.

LUNACY OF ONE OF SEVERAL MORTGAGEES—TRUSTEE ACT, 1850, s. 3.

In re Jones, 33 Chy. D. 414, the Court of Appeal determined that when one of two mortgagees (who were also trustees) had become lunatic, and a new trustee had been appointed in his place under a power, the Court had jurisdiction under the Trustee Act, 1850, to appoint a person to convey the interest of the trustee of unsound mind in the mortgage which formed part of the trust estate, for the purpose of vesting the mortgaged estate in the continuing trustee and the new trustee.

TRUSTEE ACT, 1850—NEW TRUSTEE—VESTING ORDER.

The Court of Appeal, following its decision in *Re Vicat*, 33 Chy. D. 103 (see *ante* p. 397), refused in *Re Dewhirst*, 33 Chy. D. 416, to reappoint a new trustee already validly appointed under a power, in order to vest the trust estate in the continuing trustees and the new trustee. *Re Dalgleish*, 4 Chy. D. 143, which was not cited in *Re Vicat*, was relied on by the applicants but was overruled.

EASEMENT—LEASE—MERGER.

In *Dynevor* v. *Tennant*, 33 Chy. D. 420, the Court of Appeal affirmed the decision of Pearson, J., 32 Chy. D. 375, noted *ante* p. 301.

PRACTICE—FOREIGN CORPORATION—SERVICE OF WRIT.

In *L'Honeux* v. *Hong Kong Banking Corporation*, 33 Chy. D. 446, the defendants applied to set aside service of a writ of summons. They were a foreign bank doing business in London, and the writ had been served on the head manager of the London agency of the bank. This was held by Bacon, V.-C., to be good service on the defendants, and he also held that the fact that the defendants had applied for security for costs was a waiver of any objection as to service of the writ.

CHARITY—CY-PRES—FAILURE OF OBJECT—LAPSE OF LEGACY.

In re White's Trusts, 33 Chy. D. 449, a testator who died in 1853 had bequeathed £1,000, after the death of a tenant for life, to the master and wardens of the Tinplate Workers

Company upon trust with the proceeds when a proper site could be obtained to build almshouses for the use of poor liverymen of the company, then of poor freemen of the company, and, lastly, of any poor man of the trade of a tinplate worker; and he declared that he made the bequest in the hope that some other person, actuated by the same charitable feelings, would thereafter sufficiently endow the almshouses; and he bequeathed the residue of his estate to various persons.

After the death of the tenant for life, who died in 1882, the company unsuccessfully endeavoured to obtain a site for the almshouses, and it appeared that there was no reasonable prospect of a site being obtained, and even if it could be, the company had no income available for the endowment and maintenance of the almshouses. Under these circmstances it was held by Bacon, V.-C., that as the object of the gift had failed, the fund fell into the residue as a lapsed legacy, and was not applicable *cy-pres*.

EASEMENT—ANCIENT LIGHTS—ALTERATION OF—DOMINANT TENEMENT—INJUNCTION OR DAMAGES.

The case of *Greenwood* v. *Hornsey*, 33 Chy. D. 471, was a suit to restrain the interference with the plaintiff's ancient lights. On a motion for an interim injunction the defendant was suffered to proceed with the building objected to, on his giving an undertaking to pull it down if so ordered. At the trial it appeared that the plaintiff's buildings were erected in 1872, upon the site of old buildings which had been pulled down in 1871. In the new buildings the windows were so arranged as to preserve the light which had been enjoyed in respect of the old buildings. The new buildings were somewhat higher than the old, and had an additional story. The front was advanced two feet nearer defendants' land. The defendants relied on the alterations in the plaintiff's building as an abandonment of the easement, but this contention failed, Bacon, V.-C., holding that an alteration of a building entitled to the access of light is not an abandonment of the right, unless the intention to abandon is manifest. The defendants further claimed that even if the right existed damages should be awarded under Lord Cairns' Act (see R. S. O. c. 40, s. 40) in lieu of an injunction, but in this also they failed, the learned Vice-Chancellor following *Scott* v. *Pope*, 31 Chy. D. 554, noted *ante* p. 201, holding that the way in which the case had been dealt with in the motion for the interim injunction precluded him from entering on the question.

MARRIED WOMAN—INFANT—WARD OF COURT—SETTLEMENT—(R. S. O. c. 40, s. 87).

In *Buckmaster* v. *Buckmaster*, 33 Chy. D. 482, an attempt was made to invalidate a settlement made by a married woman whilst an infant and a ward of court. The settlement was made and sanctioned by the court under the following circumstances: Upon the death of her father in 1848, the settlor became entitled under his will to a reversionary interest in his estate. In 1856 a suit was instituted for the execution of the trusts of the will. In 1862, the settlor being then eighteen, and a ward of court, married without the sanction of the court or the knowledge of her guardian. By an order made in the suit upon motion an inquiry was directed whether there had been a valid marriage, and if so, what the lady's fortune was, and what would be a proper settlement of it. And in pursuance of a report made under this order a settlement was executed in 1863 by the settlor and her husband, which was duly approved by a judge. There were four children of the marriage. In 1882 the marriage was dissolved by the Divorce Court, on the ground of the husband's adultery. In 1881 the tenant for life died, and the present petition was presented by the settlor for payment out of the fund which was in court to her, on the ground that the settlement not having been sanctioned by the court in manner required by the Infants' Settlement Act, 18 & 19 Vict. c. 43, and she being then an infant and a married woman, it was not binding on her. But Bacon, V.-C., was of opinion that the settlement was valid, as having been sanctioned under the inherent jurisdiction of the court over the property of its wards, or under the Infants' Settlement Act, and that there being an action pending it was not necessary that the order sanctioning the settlement should be made upon a petition intituled under the Act. He also held that even if invalid in its inception it had been adopted and confirmed by the settlor by various acts done by her during her coverture and after its termination.

SELECTIONS.

IRREGULAR INDORSEMENT BY THIRD PERSON—CHARACTER OF THE LIABILITY ASSUMED.

IF a person who is neither the maker nor payee of a negotiable promissory note, payable on time or on demand, indorses it in blank, before its delivery to the payee, and for the purpose of lending faith and credit to the instrument and making it acceptable to the payee, what is the character of the liability which he assumes? The conflict of the authorities upon this point is too wide and too deeply settled to make any reconciliation possible, except through the intervention of statutes. No less than four distinct views have been presented, and each has been urged with able and forcible reasoning. It is impossible to say where the truth lies; and as each State manifests a fixed intention to abide by the rule established by its own courts, it is vain to hope for any ultimate harmony of the decisions. The different theories can merely be placed side by side and contrasted.

The first view—and this prevails in more than half the States—is that the person so indorsing becomes liable as a joint-maker of the note, exactly the same as if his signature appeared below that of the maker at the foot of the paper, and, consequently, that he is not entitled to notice or protest, and should be sued in a joint action with the maker. This theory proceeds upon the following reasoning: he certainly means to pledge his responsibility in some way, and to the payee; he cannot be considered a first indorser of the note, because no one but the payee can occupy that position; neither can he be regarded as the second indorser, because, to bring about that effect, he must appear on the face of the paper to stand in the relation of an assignor, and to have given currency to the paper by his transfer of it for a valuable consideration. Nor is it possible to treat him as a guarantor of the note, for that would import a separate consideration which is not assumed in the case. We are thus brought, by the exclusion of every other hypothesis, to the necessity of holding him as an original promisor jointly with the maker of the note. But it is generally held, in those States which adopt this doctrine, that parol evidence is admissible to show that it was the contemporaneous and mutual understanding of all the parties to the transaction that he should be held liable only as an indorser and not as an original promisor, and in that case he would be entitled to notice and protest. It is stated, however, that this permission will be accorded only as between parties who are entitled to look into the original transaction; that such proof cannot be admitted against one who took the note before it was due, in the usual course of business, for value, and without notice. In Massachusetts and Minnesota, however, it is held that no evidence can be received to change the character of his liability as a joint-maker, and that neither parol proof, nor a mortgage, given with the note to secure its payment, is admissible to show that he was to be bound only as an indorser. And the fact that he agrees with the maker to be simply surety for the latter will not alter his attitude toward the payee. But it appears that he will not be liable as a joint-maker if the payee afterwards indorses his own name above the stranger's, before the note is delivered; in that case he merely becomes a second indorser. In Massachusetts, it is now provided by statute that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers"; which will take that State hereafter out of the category of those holding this doctrine.

The view just presented is also definitely established as the rule of the federal courts. In the language of Mr. Justice Clifford: "Third persons indorsing a negotiable promissory note before the payee, and before it is delivered to take effect, cannot be held as first indorsers, for the reason that they are not payees; and no party but the payee of the note can be the first indorser, and put the instrument in circulation as a commercial negotiable security. Such a third party may, if he chooses, take upon himself the limited obligation of a second indorser; but if he desire to do so he must employ proper

terms to signify that intention, the rule being that a blank indorsement supposes that there are no such terms employed, and that he is liable either as promisor or guarantor. . . . But if any one not the payee of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note, and below that of the maker; that is to say, he is held as a joint-maker, or as a joint and several maker, according to the form of the note." And the circuit courts will follow this construction, holding that for them the question is one of general commercial law, and that the decisions of the State courts, though entitled to the highest respect, are not to be followed as authorities unless agreeing with the decision above quoted, which case is regarded as conclusively settling the doctrine for the federal courts. The anomalous state of affairs which will follow upon this course is apparent at a glance. For example, a citizen of New York, who indorses a note in this way, will be an indorser when brought into the courts of that State, but an original promisor if he can be sued in the circuit court. Or, supposing him to have had no notice of non-payment, he will be liable in the federal courts, but not in the courts of his own State. However, since the supreme court has adopted a definite rule of construction, it is evidently better that those courts over which it has an appellate jurisdiction should follow the same rule than that they should conform to the practice of the particular State where they happen to be sitting.

The second view is, that a third party indorsing a note in blank before delivery to the payee enters into the original contract of the maker of the note as a co-maker, but in the character of surety or guarantor. And this opinion obtains principally in Louisiana, Texas and Arkansas. It is founded upon the theory that the place of signature, and the general import of the note indicate an intention to become responsible as surety for the maker, while, for the reasons already given, the person so signing cannot properly be regarded as an indorser. But here, also, it is generally held that evidence is admissible to show that a different obligation was designed to be assumed.

The third view is the one maintained in Illinois, Kansas, California and Connecticut; that the person so signing assumes the responsibility of a guarantor pure and simple; that his liability is only secondary, and cannot be fixed except by proof that the remedies against the maker have been exhausted; but that he is not generally entitled to notice unless injury be shown to have resulted from the want of it. This doctrine is supported in several important cases. But again we find the courts permitting him to rebut the presumption that he put his name on the note as guarantor, by showing the true character of his obligation.

Finally, the doctrine entertained in New York, Pennsylvania, Wisconsin, and in a few cases elsewhere, is as follows: Taking the note as it stands, and without any extrinsic proof of the intention of the parties, the person who indorses in blank before delivery to the payee is to be regarded as a second indorser. In this capacity he is not liable to the payee at all; nor is he liable to any subsequent holder for value, unless the payee complies with the implied condition of his signature by writing his own name above that of the blank indorser, and thus assuming the place and responsibilities of a first indorser. But parol evidence is admissible to show that the object designed to be attained by the addition of the stranger's indorsement was to give the note faith and credit, and render it acceptable to the payee; and this may also be shown by the stranger's express acknowledgment of that fact to the payee. With this extrinsic light upon the contract, he will assume the position of first indorser, the payee being second. Thus, he becomes liable to the payee (but only upon receiving all the rights of a regular indorser), and also, in like manner, to any subsequent indorsee of the payee. As remarked by Church, C.J.: "As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee." But it is not competent to show by parol that it was the intention to hold him liable as a joint-maker.

The courts of Indiana, although they hold that the presumptive liability of one signing a note in this irregular fashion is that of an indorser (in harmony with the

view last set out), yet permit parol evidence to show that the mutual understanding of the parties at the time of the transaction was that he should be held as a maker or surety. At least a note thus indorsed is admissible evidence in a suit by the payee against such indorser and the maker, as joint-makers, as a link in the chain of the plaintiff's evidence. And in Ohio, it is thought that if the undertaking of the third party can be made to take effect as an indorsement, it should always be held to do so, as conforming more nearly to the general intention of parties assuming that position upon it. Hence, if the note is not designed for the payee, and it is contemplated that the latter should indorse it as an accommodation party before it is used, then he who indorsed it at the time, or before, the note was drawn should be treated as a second indorser.

If there is no date appended to the signature of the irregular indorser, nor anything to show when it was put on, it will be presumed that he added his name at the inception of the note and before its delivery, or (what is equivalent) that he did so afterwards in pursuance of a previous agreement. But parol evidence is admissible to rebut this presumption and to show that he did not sign the instrument until after it had taken effect as between the maker and the payee, and, succeeding in this, he will change his liability from that of an original promisor to that of guarantor. It is said, however, in one case, that in favour of the original payee there is no presumption that the indorsement was before delivery; the fact must be proved; but it is otherwise in favour of a subsequent *bona fide* holder.

In Minnesota, it is held—and probably in all those States where a person so signing is regarded as an original promisor—that when the signature before delivery is proved, there arises a presumption, in the absence of evidence to the contrary, that the indorsement was made for the purpose and with the effect of giving additional credit to the note with the payee. But, as we have already seen, in New York and Pennsylvania it is directly the reverse—it is necessary to prove that such was the intention of the indorser in order to make him liable to the payee at all.

One who indorses a note that is not negotiable, as security, before delivery to the payee, cannot be charged as an indorser of the note; because there is no such thing as an "indorsement," speaking in the strict commercial sense, of non-negotiable paper; he will therefore be liable to the payee as maker or guarantor. Or, as stated in Connecticut, he contracts that the note is due and payable according to its tenor, that the maker shall be able to pay it when it comes to maturity, and that it is collectible by the use of due diligence. Of course if the note is payable to the maker or his order, the person so signing it is simply an indorser.—*Central Law Journal.*

[The authorities will be found on reference to the above publication, vol. 24, p. 3.]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

JOHNSTON v. SHORTREED ET AL.

By deed dated 4th April, 1884, made between J. and S. & L., J. agreed to sell and S. & L. to purchase all the merchantable pine suitable for their purposes, standing, lying, and being on certain described property, for a sum which was then named and paid, "provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884."

The defendant B. (claiming through S. & L.), after the expiration of the time agreed upon, removed logs which J. had cut after said 4th day of April, 1884, and for this J. brought this action and recovered a verdict for $125.

B. moved against the verdict on the ground that under the deed and the assignment to him he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendees for breach of the covenant to remove the pine within the time named.

Held (O'CONNOR, J. dissenting), that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees; subject to a *covenant* by them to cut and remove the trees within ten years; *but* that it was a grant of the pine subject to the *condition* that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884.

Held, also, that this condition applied as well to trees severed before as to those severed after the expiration of the term.

Held, *per* O'CONNOR, J., that the case was within the meaning of the law as decided by the court in the case of *McGregor* v. *McNeill*, 32 C. P. 538, and that the defendant was the absolute owner of the timber, with an affirmative license to cut and remove the same, which the vendor could not revoke, although the time within which the timber was to be removed had expired, though the vendor might have other remedies.

Pepler, for motion.

Strathy, Q.C., contra.

RIVER STAVE CO. v. SILL.

A company incorporated in Michigan, while insolvent had given a mortgage on chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect was to delay and prejudice other creditors and give defendant a preference over them.

Held, under 48 Vict. ch. 26 (O.), that without regard at all to any questions of *bona fide* pressure or knowledge of the company's position by its officers or defendant, the effect alone of the transaction voided it.

Held, also, that the mortgage was not given in pursuance of any antecedent contract or promise of the company; but even so, it could not be upheld, because not shown to have been given for a money advance made in the *bona fide* belief that it would enable the debtor to carry on and pay in full.

Held, also, that the property mortgaged being in Ontario, the transaction was governed by its laws, without regard to those of Michigan.

Aylesworth, for the motion.

Douglas, Q.C., contra.

IN BANCO.

MCMICHAEL ET AL. v. GRAND TRUNK RY. CO.

Plaintiffs' horses, because of insecure fastening of the gates at the farm crossing, got through the gates and were killed on the railway track by a passing train.

Held, that the contention that by reason of the continual user by plaintiffs, without complaint, of the defective fastenings, they had adopted them as sufficient, and could not complain, was not well founded, but defendants were bound to see the fastenings were sufficient.

47 Vict. ch. 11, sec. 9, commented on.

McMichael, Q.C., for plaintiff.

W. Nesbitt, contra.

MASTERS v. THRELKELL.

Covenant—Proviso for acceleration of time for payment.

A covenant that one half of the surplus proceeds of goods transferred by a debtor to his surety after deduction of liabilities should be paid to the debtor by the surety by his promissory note at two years, with a proviso that should the defendant or the firm of T. & S., of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due. S. retired from the business, and transferred to the defendant all his interest therein.

Held, that the time of payment of the note was not by that means accelerated.

Lash, Q.C., for motion.

Geo. Bell, contra.

MITCHELL v. CITY OF LONDON INSURANCE CO.

G. insured a tug while navigating the rivers Sydenham, St. Clair, Detroit and Thames, and Lake St. Clair, loss, if any, payable to M. as his interest may appear. At the time the insurance was effected the tug was libelled in the American Admiralty Court, and to avoid the claim therein, he used the proceedings of the

Maritime Court, upon a claim for wages, to make a fraudulent sale of the tug to I. Afterwards G. procured a renewal of the policy without disclosing the sale. G. then assigned the policy to M., who sent it to the defendants for their consent thereto, but before it was given the tug was burned in the Chenal Ecarte. At the time of the fire crude petroleum and rock oils were kept in the tug for lubricating purposes. M. and I. delivered proof papers of claim, but G. did not deliver any. At the trial leave was given to add G. and I. as co-plaintiffs, andjudgment was directed to be entered for the full amount of the insurance.

Held, 1. That the leave to add G. and I. as co-plaintiffs had been properly given, but that the judgment should be reduced to the amount of M.'s claims.

2. That the tug was, at the time of the fire, in one of the localities allowed by the policy.

3. That the crude and rock oils being kept for lubricating purposes, clause f of the 10th Statutory Conditions did not apply.

4. That there was a sufficient compliance with the 12th and 13th Statutory Conditions.

Per WILSON, C. J. There was not sufficient proof of loss, and the defendants were not liable by reason of the crude and rock oils being kept in the tug.

Per O'CONNOR, J. A tug is not a building within clause f of the Statutory Conditions.

W. R. Meredith, Q.C., for motion.

Robinson, Q.C., and *Millar*, contra.

Wilson, C.J., in Single Court.]

BELL TELEPHONE COMPANY v. BELLEVILLE ELECTRIC LIGHT COMPANY.

License from municipal corporation—Telephone and Electric Light Companies—Interference by second licensee with rights of first—R. S. O. ch. 157, secs. 59, 70; 45 Vict. ch. 19, sec. 3 (O.).

An interlocutory injunction having been granted to restrain defendants who were carrying on business in partnership as an Electric Light Company under license from a municipal corporation from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated Telephone Company, also licensees of the corporation under authority granted two years previously to the defendants' license,

Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights.

Held, also, that independently of the provisions of R. S. O. ch. 157, secs. 59 and 70, as extended to Electric Light Companies by 45 Vict. ch. 19, sec. 3 (O.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted.

Quære, whether defendants were liable to indictment.

S. G. Wood, for motion.

Dickson, Q.C., contra.

HISLOP v. TOWNSHIP OF MCGILLVRAY.

In an action against a township charging, (1st) the stopping up of a high way, thereby preventing access to plaintiff's farm; (2nd) the obstructing of a highway, thereby, etc.; (3rd) the not maintaining and repairing a highway, thereby, etc.,

Held, *per* WILSON, C. J., that as the part of the highway complained of was part of an original allowance for road which had never been opened or made, the statement of claim did not properly describe the subject of complaint, and the plaintiff must therefore fail.

2. That an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason in respect of means or otherwise, why such allowance should not be opened; and if the work required to be done for that purpose be worth the outlay required to open and maintain the same.

3. That although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it.

4. That if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence.

Semble, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act.

Per ARMOUR, J., that the action would not lie, the matter in question being strictly in the discretion of the municipal council: that the verdict was not sustained by the evidence, and if necessary a new trial should be granted.

Per O'CONNOR, J., that the action was sustainable in law, and the verdict was supported by the evidence.

W. R. Meredith, Q.C., for motion,
McCarthy, Q.C., and *R. Meredith*, contra.

IN BANCO.

FROST v. HINES.

Action to recover land—1st and 2nd mortgagee—Lease by mortgagor after mortgage—Mortgagee in possession.

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. and S. Co. On 17th March, 1883, C. made a second mortgage to L., who assigned to plaintiff. On 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at $175 for the first year, and $165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at the defendant's request. The rent payable on 27th October, 1883, 1884 and 1885 was paid by defendant to H., who remitted the mone to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease or of its provisions. The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage being in default. The defendant set up the lease, and the clause referred to, the payment of rent to the company, and that he was tenant to the company whose mortgage was in default.

Held, that plaintiff, as second mortgagee, was entitled to recover, unless it could be established that defendant was in possession as tenant of the first mortgagees, and not as tenant of the mortgagor.

Held, also, that as the company received the money sent them by H., not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant.

Held, also, that even if the company had been aware of the provision in the lease, and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor."

Lash, Q.C., for motion.
Hoyles, contra.

PRACTICE.

RE REDDAN.

"The Devolution of Estates Act, 1886," 49 *Vict. c. 22 (O.)—Rights of widow of intestate deceased—Release of dower—One third absolutely.*

R. died intestate, entitled to real and personal property, leaving a widow and children.

Held, that the widow having elected to take her interest under section 4 of "The Devolution of Estates Act, 1886," 49 Vict. c. 22 (O.), was entitled to one third of the real estate absolutely.

J. Hoskin, Q.C., for the infants.

Huson Murray, for the widow.

E. T. Malone, for the inspector on behalf of a lunatic son.

Proudfoot, J.] [Jan. 13.

TEMPERANCE COLONIZATION SOCIETY V. EVANS ET AL.

Jury notice—Exclusive jurisdiction of equity—Judicature Act, sec. 45—Action for declaration of right to specific performance—Equitable issues between defendants—Misrepresentations—Construction of agreement, statute, and correspondence—Prejudicing the jury—C. L. P. Act, sec. 255.

The action was brought (1) for the recovery of instalments under a scrip contract, and (2) for a declaration of the plaintiffs' rights to a specific performance of the part of the contract as to settlement duties. The time for the performance of the settlement duties had not arrived, but the defendants denied any right in the plaintiffs upon the contract at all, and the consequence of the non-performance it was shown would be not only to prevent the plaintiffs from getting a rebate in price, but under the terms of the contract with the Dominion Government might result in the forfeiture of the whole agreement.

Held, that the plaintiffs, if they established their case, would be entitled to a declaration of the liability of the defendants to perform the contract, and that the (2) cause of action was not one that could be answered in pecuniary damages, or upon which there would have been before the Judicature Act any adequate remedy at law, and a jury notice was therefore improper under section 45, and should be struck out.

Held, also, that the circumstance that equitable issues were raised between the defendants was also a ground for striking out the jury notice.

One of the defences relied upon was the falsity of representations in the prospectus, and whether or not the representations were false depended in part upon the construction of the agreement between the plaintiffs and the Dominion Government, and of the Public Lands Act, 1879, and of the nature and effect of a correspondence between the plaintiffs and the government.

Held, that the question whether there were any and what statements in the prospectus that amounted to a representation the falsity of which would afford a defence, and the determination of the fact of the falsity were matters, if not exclusively for the judge, at least more proper for the consideration of a judge than a jury.

But even assuming that all the grounds of action would have been of common law cognizance, a judge has power under section 255 of the C. L. P. Act to direct the action to be tried without a jury, and it is a reason for such direction that by acts of persons other than the defendants, but of which the defendants may get the benefit, the plaintiffs may be prejudiced before a jury.

A. H. Marsh, for the plaintiffs.

Hoyles, for the defendants.

Per BOYD, C.—The onus was on the defendants to prove the unfitness, and the jury, as is manifest by their recommendation, did not intend to pronounce against the plaintiff's competency. The findings were left in too uncertain a state to enter a verdict for either party against the will of the other. No material part of what the jury returns to the judge should be disregarded.

Per PROUDFOOT, J.—The duty of the jury was completed when they answered the questions. It was for the judge to determine what the legal result of the answers was. The jury's recommendation would rather seem to have been done more for sympathy for the plaintiff than with the desire of affirming his competency, which they had previously found was not proved.

Aylesworth, for the plaintiff.

Cassels, Q.C., for the defendants.

Divisional Court.] [January 8.

BUDD v. BELL.

Negligence of master in instructing a servant respecting machinery.

The plaintiff having had years of experience in running iron work machines, and having been previously employed by the defendants in their wood working manufactory, hired a second time, and was injured in working a jointer, which he was told other men had been injured at. In an action against his employers,

Held, that plaintiff knew from his own inspection and experience that the machine was dangerous, that it needed caution and firmness in operating, that the risks were open to his observation, and that his opportunities and means of judging of the danger were, at least, as good as those of his employers, and a motion to set aside a nonsuit entered at the trial was dismissed.

Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow-servant, though it may be of a higher grade.

J. L. Murphy, for the plaintiff.

A. H. MacDonald, for the defendant.

Divisional Court.] [January 8.

MEYER ET AL v. BELL.

Seduction—Right of mother and stepfather to maintain action when daughter not living with plaintiffs.

In an action for seduction brought by the mother and stepfather of the daughter, it appeared that at the time of the seduction the daughter was not living at home with the plaintiffs, but was out at service.

Held (affirming Galt, J.), that the plaintiff had the right to maintain the action.

German, for the plaintiff.

Osler, Q.C., for the defendant.

PRACTICE.

Ferguson, J.] [January 17

SNOWDEN v. HUNTINGTON.

Chambers appeal—Time—Christmas vacation—Extending time.

The time of Christmas vacation is not to be excluded in reckoning the eight days within which an appeal from the Master in chambers, or local Judge, or Master sitting in chambers, is to be brought on as required by Rule 427.

As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an *ex parte* application.

Hoyles, for the plaintiff.

W. M. Douglas, for the defendants.

Ferguson, J.] [January 17

RE S., INFANTS.

Habeas corpus—Evidence—R. S. O. ch. 70, sec. 1—Foreign commission—Discovery.

Held, that the provision in R. S. O. ch. 70, sec 6, that the court or Judge before whom any writ of habeas corpus is returnable may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation is permissive only, and that a Judge has power in such a case to direct that the evidence shall be taken *viva voce* before him.

And in this matter it was directed as in *Re Murdoch*, 9 .P.R. 132, that the evidence should be taken *viva voce*, and it was ordered besides that a foreign commission should issue to take evidence abroad and that the parties to the application should be at liberty to examine each other for discovery before the hearing.

Maclennan, Q.C., and *H. J. Scott*, Q.C., for the father of the infants.

S. H. Blake, Q.C., and *H. Cassels* for the mother.

Ferguson, J.] [Jan. 24.

RE ALLISON ET AL., SOLICITORS.

Solicitor and client—Delivery of bill of costs—Offer by solicitor—Taxation.

Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then, and not otherwise, he is allowed the benefit of the offer, if the client reject it, and proceed to tax the bill.

Re Freeman et al., 1 P. R. 102, and *Re Carthew* and *Re Paull*, 27 Ch. D. 485, considered and explained. And where the offer to make a reduction in the bill was not upon the face of it, nor in any letter accompanying it, but was made verbally, and in the course of a conversation on the subject after the delivery of the bill,

Held, that the offer was not of an unequivocal character, made so as to be binding upon the solicitor, but left him free, when it was not accepted, to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it.

Macnee, for the solicitors.

Watson, for the client.

Boyd, C.] [Jan. 25.

MACDONALD V. MCCALL ET AL.

Costs as between solicitor and client—Creditor's action—Contribution—Payment out of fund—Appeals.

In a creditor's action to set aside a chattel mortgage as preferential, the judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant, C., as may contribute to the expenses of the suit. This judgment also directed that the plaintiff should be paid his party and party costs by the defendant, McC., and his additional costs, as between solicitor and client, out of the fund recovered for the creditors by setting aside the mortgage. The case was carried by the defendants to the Court of Appeal and the Supreme Court of Canada, and the judgment at the trial was finally affirmed in all respects, bu the additional costs, as between solicitor and client, were not given by the Court of Appeal or the Supreme Court.

Held, that the plaintiff's expenses in saving the fund were not limited to party and party costs, but extended to those incurred, as between solicitor and client, to the end of the proceedings in the appeal to the Supreme Court. The principle is that when, in a creditor's suit, the fund is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has borne on behalf of all creditors. The plaintiff had a right, therefore, to object to the other creditors coming in to share in the fund, until they had contributed to these extra costs; and, in order to avoid circuity, it was directed that they should be taxed and paid out of the fund.

Middleton, for the plaintiff.

George Kerr, for the defendant, McCall,

CORRESPONDENCE.

LIMITATION OF ACTIONS.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—I have read your editorial article in the last number of the CANADA LAW JOURNAL on the subject of the period of limitation for enforcing a mortgage or judgment.

No one will, I suppose, question the propriety of adhering to the course of decision in England in all branches of our law which are founded upon the law of England, and amongst others to English authorities as to the meaning of a Statute which has been copied from an Imperial Act, "*if*," (as put by Judge Rose in *Macdonald* v. *Elliott*, 12 Ont.

100), "upon examination of the English Act and ours, it appears that there is no substantial difference in the language, and that the same rules of construction should be applied."

I wish, however, to make a humble remonstrance against such an indiscriminate adoption of English decisions as you would seem to advocate, and more especially against the English decision in *Sutton* v. *Sutton*, 22 Chy. Div. 511 (the text of your article), being taken to be "the very opposite" of the decisions you mention of our Court of Appeal. Is it not possible that the Court of Appeal in *Sutton* v. *Sutton*, and the other recent English cases has rightly construed the Statute upon which it was required to adjudicate, and that *Allan* v. *McTavish*, 2 Ont. App., and *Boice* v. *O'Loane*, 3 Ont. App., are also correctly decided in view of the condition of our legislation on the same subject?

The two latter cases, as I understand them, proceeded on the ground that Con. Stat. U. C. c. 78, named the period (20 years) of limitation for a personal action, and Con. Stat. U. C. c. 88, the period of limitation (also 20 years) for enforcing a charge against land, and that the Act of 1874 (reducing certain periods of limitation to ten years) was only enacted in amendment of Con. Stat. U. C. c. 88, leaving c. 78 unaffected, so that practically there was existing in this Province a state of things similar to that which existed in England when *Hunter* v. *Nockolds*, 1 Mac. & G. 640, was decided, the two corresponding Imperial Statutes having been passed in the same Session.

In *Sutton* v. *Sutton*, the court had to deal with an Act of 1833 and an Act of 1874, and held that the latter Act effected a repeal of inconsistent provisions in the former.

Allan v. *McTavish* and *Boice* v. *O'Loane* were decided upon the legislation prior to the Revision of 1877, and, assuming for the sake of argument, (though only for the sake of argument), that the court was not correct in holding that the Act of 1874 was merely an amendment of Con. Stat. c. 88, and had no effect upon Con. Stat. c. 78, did not the Revised Statutes, which came into force on the 1st January, 1878, adopt the construction afterwards put by the Court of Appeal upon the two chapters of the Con. Stat.? We there find in chap. 61, sec. 1, the period of 20 years as the limitation of the personal action, and in chap. 108, sec. 23, a clause identical with the English clause in question in *Sutton* v. *Sutton*, and with our Provincial enactment of 1874 (except that ten years instead of twelve is the reduced period of limitation). Further, in regard to judgments, on turning to chap. 50, sec. 330, we find a section which contemplates proceedings to enforce a judgment, upon which writs of execution have never been issued after it is more than 15 years old.

In view of the above three provisions occurring in the Statutes passed in the same Session, is it not reasonable to conclude that our Court of Appeal, if the matter again arose, might properly hold that the circumstances existing here are practically those which existed in England when *Hunter* v *Nockolds* was decided, but which had ceased to exist before *Sutton* v. *Sutton* was decided, and that therefore, the decisions in this country should still follow *Hunter* v. *Nockolds*?

Further, is it not also reasonably arguable that if the tribunal which decided *Sutton* v. *Sutton* had been then construing our Acts, its decision would have been in accordance with *Allan* v. *McTavish* and *Boice* v. *O'Loane*?

In *Sutton* v. *Sutton*, at page 518, Cotton, L J., says:—

"One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds*, 1 Mac & G. 640, decided by Lord Cottenham, in which he expressed an opinion that although in actions brought to recover money issuing out of the lands, only six years' interest could be allowed, yet he based his decision upon this ground that one must take the two Statutes, 3 & 4 Will. IV., c. 27, and 3 & 4 Will. IV., c. 42 together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was only passed three weeks before the other, and therefore he said you must read the two together, and take the latter one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to leave the same bar to an action on the covenant, as that which is provided by section 42 of the earlier Act. There is no necessity to follow in this case the way in which Lord Cottenham dealt with the two Acts passed almost simultaneously."

Yours truly,

THOMAS LANGTON.

Toronto, Jan. 28th, 1887.

[The point aimed at was not so much whether the case of *Sutton* v. *Sutton* did override *Boice* v *O'Loane* and *Allan* v. *McTavish*; as whether assuming it did so (and as the learned judges quoted from appear to have assumed), the decision of the Court of Appeal in England should be held to override a decision of our Court of Appeal, where such decisions were, on the same point, to the opposite effect.—Ed. LAW JOURNAL.]

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DIARY FOR FEBRUARY.

15. Tues.....Sittings of Supreme Court Canada begin.
17. Thur.....Sittings of Chancery Divisional Court begin.
19. Sat .....Hilary sittings end.
20. Sun.....*Quinquagesima Sunday.*
23. Wed.....Ash Wednesday.
27. Sun.....*Quadragesima Sunday.*

TORONTO, FEBRUARY 15, 1887.

WE publish in another place the proceedings of the annual general meeting of the County of York Law Association. The report of the trustees is very full, and leaves little to be said. The affairs of the association have been carefully attended to, and if it be proper to single out any individual for thanks in this connection, we think none of his associates will object to the observation that Mr. Walter Barwick has done yeoman's service in the cause, sparing neither time nor energy in endeavouring to make the association a success. In this there has been no failure. One of the resolutions very properly refers to the valuable co-operation of His Honor, Judge Macdougall. The purposes and suggestions of the association are not limited to the welfare merely of the bar of its own county. It may prove a rallying-point for the profession of the Province, and the excellent report of the trustees will be almost of as much interest in the outer counties as in the metropolitan county of York.

THE delay of the Dominion Government in appointing a fourth Judge for the Chancery Division was at one time considered a grievance; but in the minds of many no great harm has, after all, been done. The necessity of a fourth Judge in that Division is not now so apparent as it was some years ago. The alternate issue of writs in the several Divisions of the High Court has had the effect intended, and the undue pressure which formerly existed in the Chancery Division has been sensibly relieved, and, we are inclined to think, has entirely disappeared. As to the division of work it may here be remarked that the Queen's Bench and Common Pleas Divisions already work together, on a principle of amalgamation, so that the weekly business of both these Divisions at Osgoode Hall is taken by the same Judge. The Chancery Division, on the other hand, still runs its course alone. Why should this be so?

If the business of all the Divisions were pooled, one judge could just as well dispose of the business of the three Divisions as of one or two, for a great many weeks in the course of the year. Sometimes, it is true, there is an extra amount of work, but for this special arrangements might be made. The advantage in having all the business for the week, in all the Divisions, transacted in one court would be a great boon to counsel. By this means each Judge would have to take his turn in court only once in twelve weeks. Then, again, the circuit business, as at present arranged, leads to a useless waste of strength and money, special sittings of the Chancery Divlsion being held quite unnecessarily in many places in addition to the assizes. This very obvious waste would probably have been corrected before this, but for the fact that the Judges look to their circuit allowances as a material part of their salaries, which, naturally enough, they are unwilling to forego.

JUDICIAL SALARIES.

ONE of the leading dailies has recently referred to the subject of the smallness of the salaries of the Ontario judges. It stated, and that truly, that considering the nature and amount of the work which they perform, the occupants of the Bench in Ontario are more inadequately paid than any other class of public officials. A comparison of the amounts paid to the Canadian judges with the sums paid to the judiciary in other possessions of the Crown will show that the Ottawa Government has not been extravagant in that direction, wherever else it may have erred.

We extract our figures from "Whitaker's Almanac" for this present year of grace, remarking, by the way, that as that authority and mine of interesting statistics and information is correct as to Ontario, we will assume it is right with regard to the other countries. We give only the salaries of the Chief Justices and the Puisnes.

	Chief Justice.	Puisne.
England	£8,000	£5,000
Scotland	4,800	3,000
Ireland	5,000	4,000
N. W. Provinces India, per month	Rs. 5,000	Rs. 3,750
Bombay, per month	Rs. 5,000	Rs. 3,750
Ceylon	£2,250	£1,800
Straits Settlement	$12,000	$8,400
Hong-Kong	£2,500	£1,700
New South Wales	3,500	2,600
Victoria	3,500	3,000
South Australia	2,000	1,700
Queensland	2,500	2,000
West Australia	1,600	700
New Zealand	1,700	1,500
Tasmania	1,500	1,200
Fiji Islands	1,500	750
Cape Colony	2,000	1,750
Natal	1,500	1,000
Sierra Leone	1,500	....
Gold Coast	1,500	1,000
Mauritius	1,750	1,200
Malta	1,000	....
Gibraltar	1,250	....
Jamaica	2,500	....
Trinidad	1,800	1,200
Leeward Islands	1,500	1,200
Barbadoes	1,500	....
British Guiana	2,500	1,500
Canada Supreme Court	1,649	1,440
Ontario	1,400	1,200
Quebec	1,200	1,000
Nova Scotia	1,000	800
New Brunswick	1,250	....
Manitoba	1,000	800
British Columbia	1,160	960
Prince Edward Island	822	657
Newfoundland	1,041	833

Hong-Kong is about eleven miles long, with an average width of 3 or 4 miles, and contains 10,000 people. West Australia contains only 35,000 persons.

Our American cousins share, to some extent, with us the notion that a superior article of judges can be obtained for a small price. But with them ofttimes the Bench is but a stepping-place to something higher and better, and only intended as a temporary rest.

In Oregon the Chief Justices get $2,000; the Associate the same. Delaware, Nebraska, New Hampshire, North Carolina, Vermont and West Virginia give between $2,000 and $3,000; Arkansas, Florida, Georgia, Kansas and Maine give $3,000; Virginia, $3,200; Alabama, Mississippi, and Texas, $3,500; Indiana, Iowa, Kentucky, Michigan, Ohio, South Carolina, Tennessee, $4,000; Minnesota, $4,500; Colorado, Illinois, Louisiana, Wisconsin, $5,000; Missouri and Rhode Island, $5,500; California and Nevada, $6,000; Massachusetts, $6,500; New York, $7,500; while New Jersey and Pennsylvania reach $8,500. The Associate Justices either get the same, or within a couple of hundred dollars. The New York City judges get $15,000 a year. The Bar Associations in the United States are agitating for an increase to these salaries, contending that those now paid do not decently meet the cost of living in large cities for men in high public positions. We may return to this subject again.

RECENT ENGLISH DECISIONS.

The January numbers of the *Law Reports* comprise 18 Q. B. D., pp. 1-161; 12 P. D., pp. 1-31, and 34 Chy. D., pp. 1-87.

Arbitration and award — Valuation — Application to set aside award.

The first case we think deserving of attention is *In re Carus-Wilson and Greene*, 18 Q. B. D. 7, in which the difference between a mere valuation and an award is emphasized. On the sale of land one of the conditions of sale provided that the purchaser should pay for the timber on the land at a valuation, and that for the purpose of such valuation that each party should appoint a valuer, and that the valuers thus appointed should, before proceeding to act, appoint an umpire; and that the two valuers, or, if these disagreed, the umpire, should make the valuation. The two valuers failed to agree, and the umpire made the valuation. The agreement for sale having been made a rule of Court, the vendor, being dissatisfied with the valuation, applied to the Divisional Court to set it aside, which application was refused on the ground that it was a mere valuation, and not an award on an arbitration, and this decision is now affirmed by the Court of Appeal. The principle of law involved in the case is thus stated by Lord Esher, M.R., at p. 9:

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was, that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry, worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation.

Applying this principle to the case before him, he says:

> My reason for holding that the umpire here was not an arbitrator is, that he was, in my opinion, merely substituted for the valuers, to do what they could not do, viz.: fix the price of the timber. He was not to settle a dispute which had arisen, but to ascertain a matter, in order to prevent disputes arising.

Charter party — Excepted perils — Collision — Freight.

In *The Sailing Ship "Garston" Company* v. *Hickie*, 18 Q. B. D. 17, the Court of Appeal affirmed a decision of Grantham, J. A charter-party provided that the ship should load a cargo of coal, and deliver the same at the port of discharge, at a freight of so much per ton (the act of God, etc., and all and every other dangers and accidents of the seas, rivers, and navigation always excepted), the freight to be paid two-thirds in cash ten days after the vessel's sailing, and the remainder in cash on the right and true delivery of the cargo, agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity. A collision took place, owing to the negligence of those in charge of the other vessel, whereby a part of the cargo was lost; and it was held that the collision was "a danger or accident of navigation" within the meaning of the charter-party, and, therefore, that the ship owners were not liable in respect of the non-delivery of the part of the cargo so lost, but that the charterers were entitled, nevertheless, under the charter-party, to set off the cost of the coal so undelivered against the balance of freight payable at the port of discharge.

Chattel mortgage — Future book debts.

In *Official Receiver* v. *Tailby*, 17 Q. B. D. 25, the question was whether a chattel mortgage which purported to assign to the mortgagee "all the book debts which might, during the continuance of the security, become due and owing to the mortgagor," was valid. The judge of the County Court of Birmingham held it to be invalid. This decision, however, was reversed by a Divisional Court of the Queen's Bench Division, but the latter decision was reversed by the Court of Appeal—that Court holding that the description of the debts was too vague. Lindley, L. J., says at p. 31: "I do not say that an assignment of future book debts must necessarily be too vague; but when there is no limitation of them with regard to any particular business, I think the assignment is too vague," and in this view all the judges in Appeal agreed.

Trial at bar — Action in which crown interested — Venue.

In *Dixon* v. *Farrer*, 18 Q. B. D., 43, the Court of Appeal affirmed the decision of

Divisional Court, 17 Q. B. D. 658 (noted *ante* vol. 22, p. 396), affirming the right of the Attorney-General to claim a trial at bar in actions in which the Crown is interested, and holding that the Court is bound, on the Attorney-General waiving that right, to change the venue to any county wherein he elects to have the action tried.

PRINCIPAL AND AGENT—DIRECTORS—LIABILITY TO MAKE GOOD REPRESENTATION—MEASURE OF DAMAGES.

The case of *Fairbanks* v. *Humphreys*, 18 Q. B. D. 54, is another decision of the Court of Appeal, in which it was held that where the directors of a company induced an engineer, who was a creditor of the company, to go on with his work and to accept, in payment of his claim, debenture stock to the amount of £18,400 in lieu of cash, and issued certificates to him for the agreed amount of the stock, which certificates turned out to be valueless, owing to the fact that the directors had previously issued all the debenture stock the company were entitled to issue—the directors were personally liable to the creditor for the value of the stock so agreed to be accepted by him, on their implied representation that, they had authority to issue debenture stock which would be a valid security; and that under the circumstances (valid stock being worth its par value, and the company having become insolvent, so that the plaintiff could not recover anything from the company), the measure of damages was the par value of such stock. The rule of law applicable to the case is thus stated by Lord Esher, M.R., at p. 60:

> Where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.

CERTIFICATE FOR COSTS—PROHIBITION.

In *The Queen* v. *The Judge of the City of London Court*, 18 Q. B. D. 10, a prohibition was granted under the following circumstances. A statute enabled the judge of an inferior court to award costs according to the higher scale, provided that he certified "that the action involved some novel or difficult point of law, or that the question litigated was of importance to some class or body of persons, or of general or public interest." The judge certified "question of character; costs on higher scale." It was held that this was not a compliance with the statute, and a prohibition was awarded against enforcing payment of the costs.

EXECUTOR AND ADMINISTRATOR—SERVICES RENDERED TO ESTATE WHILST NO PERSONAL REPRESENTATIVE—RATIFICATION BY ADMINISTRATOR.

In re Watson, 18 Q. B. D. 116, the question arose as to how far a deceased person's estate was liable for services rendered by a solicitor in reference to the estate prior to the appointment of a personal representative. A Divisional Court (composed of A. L. Smith and Wills, JJ.), laid down the rule to be "that a person cannot bind an estate to pay for services rendered to it by him, unless he shows that some contractual relation in respect of those services existed between himself and some person having authority to bind the estate, or who subsequently obtained that authority." Wills, J., at p. 119, says:

> The essential conditions are that there should be a contract with some person professing to act for the estate, that the contract should be for the benefit of the estate, and that the person in question should afterwards become administrator, and should, after being so appointed, have ratified the contract. Under these circumstances, the case comes within the principle of law, that a subsequent ratification of a contract by a person with authority to ratify it, relates back to, and supports the contract.

INDIAN OFFICER'S PENSION—EXECUTION—RECEIVER.

In *Lucas* v. *Harris*, 18 Q. B. D. 127, the Court of Appeal determined (overruling the Divisional Court), that the pension of an officer of her Majesty's forces, being by s. 141 of the Army Act 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve; and therefore, an order appointing a receiver of such a pension was set aside.

TROVER—ESTOPPEL—WAREHOUSE RECEIPT.

The case of *Seton* v. *Laforce*, 18 Q. B. D. 139, turns upon the doctrine of estoppel by representation. Goods were in 1875 stored by brokers in a warehouse. The warehousemen issued a receipt stating on its face that it was "the only document issued by us as a legal symbol of these goods," and that after a named

date "this warrant will alone be sufficient to obtain delivery." The defendant subsequently took over the warehouse and business, and in 1885 his servants, by mistake, delivered the goods to the wrong person. The brokers had indorsed the warehouse receipt, and in 1886 it was in the possession of B. and E. The defendant believing that the plaintiffs, as successors in business of the brokers who stored the goods, were still in possession of the receipt, and in ignorance of the erroneous delivery of the goods, wrote to the plaintiffs, claiming rent for the goods, and notifying them that unless it were paid the goods would be sold. The plaintiffs did not immediately answer the letter, but set to work in consequence of its receipt, and purchased the receipt from B. and E., intending to make a profit out of the goods. On presenting the receipt to the defendant it was then discovered that the goods were not in his possession, and the present action of trover was brought. On the part of the defendant it was contended that he was not liable, because the goods were not in his possession when first demanded of him by the plaintiff, and also because he was not a party to the warehouse receipt. But Denman, J., held, that the plaintiffs having been induced to purchase the receipt in consequence of the defendant's representation that he still had the goods in his possession, the defendant was estopped, and was bound to make good that representation, and he gave judgment for the plaintiffs for the market value of the goods at the time the action was brought, as found by the jury, less the amount which would have been payable for rent if the goods had been forthcoming.

SHIP—BILL OF LADING—QUALITY MARKS—ESTOPPEL—REPRESENTATION.

In *Cox* v. *Bruce*, 18 Q. B. D. 147, an unsuccessful attempt was made to fasten a liability on a ship owner to make good an erroneous statement contained in a bill of lading as to the quality marks on the goods mentioned therein. The bill described the goods as marked in proportions specified with different quality marks, indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks, and more marked with another of such marks indicating an inferior quality. The Court of Appeal held that an indorsee of the bill of lading for value, without notice of the incorrectness of the description of the marks, had no right of action against the ship owners, either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading.

SEAMAN'S WAGES—MARITIME LIEN—PRIORITY OF CLAIMS.

Turning now to the cases in the Probate Division, *The Adalina*, 12 P. D. 1, first challenges attention. In this case it is held that seamen have a maritime lien on freight due from sub-charterers to the charterers of a ship, and can arrest the cargo for the purpose of enforcing such lien; and that the lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, and the light dues and dock dues.

WILL—EXECUTION AT FOOT OR END—(R. S. O. c. 106, s. 12)—REVOCATION.

The case of *Margary* v. *Robinson*, 12 P. D. 8, illustrates in a remarkable way how the positive provisions of the statute relating to the execution of wills may sometimes defeat the positive intention of testators. In this case the testator, being in a paralyzed condition, made known to his attendants by signs that he desired to make a will, and a memorandum was accordingly drawn by one of his medical attendants on a card, by which the testator bequeathed £30,000 to Miss Robinson for life; the testator, instead of executing it at the foot or end, as prescribed by the statute (see R. S. O. c. 106, s. 12), unfortunately for the legatee, put his mark in the middle of the writing; and this was held a fatal objection to the validity of the document as a will. After its execution the witnesses, thinking the document did not amount to a will and was a mere memorandum, so informed the testator, to which he seemed to assent, and they then erased their attestation, but the testator retained the card in his possession, and afterwards showed it to the legatee and informed her it was for her; and after his death it was found in a handbag he kept near his bed. It was held that assuming the will to have been properly

executed, that these facts would not have amounted to a revocation.

PROBATE—CODICIL ONLY DULY EXECUTED PAPER FORTHCOMING—LOST WILL.

Gardiner v. *Courthope*, 12 P. D. 14, is another probate case, in which at the death of the testatrix the sole testamentary papers forthcoming were a duly executed codicil, and two drafts of wills, as to the execution or revocation of which there was no evidence. It was held that though the codicil by its language was dependent on the will to which it belonged and could not be construed without it, it ought nevertheless to be admitted to probate.

NULLITY OF MARRIAGE—DURESS.

The only remaining case to be noticed in the Probate Division is the somewhat notorious one of *Scott* v. *Sebright*, 12 P. D. 21, which was a suit for nullity of marriage, on the ground that the petitioner had been induced to go through the marriage ceremony in consequence of threats and coercion and undue influence exercised towards her by the respondent. The petitioner, who was a young woman of twenty-two years of age, entitled to £26,000 in possession, had become engaged to the respondent, and shortly after coming of age had been induced to accept bills for his accommodation to the amount of £3,325. The persons who discounted these bills issued writs against the petitioner and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health, and reduced her to a state of bodily and mental prostration, in which she was incapable of resisting coercion and threats; and being assured by the respondent that the only way of evading bankruptcy proceedings and exposure was to marry him. She reluctantly went through a ceremony of marriage with him at a registrar's office, the petitioner threatening to shoot her if she showed that she was not acting of her free will. The marriage was never consummated, and the petitioner and respondent separated immediately after the ceremony. The marriage was declared to be null and void.

RESTRICTIVE COVENANT—REPRESENTATIONS—COLLATERAL AGREEMENT.

Turning now to the cases in the Chancery Division, we come to *Martin* v. *Spicer*, 34 Chy. D. 1, which appears to carry the doctrine whereby a representation is construed as a collateral agreement, to an extraordinary length. The defendant, S., was the owner of various houses in Cromwell Gardens. He let one of the houses to the plaintiff. S.'s solicitor sent to the plaintiff's solicitor a draft lease with a letter ending: "I may perhaps add that the draft is the form used for all the houses on S.'s estate." The draft contained a restrictive covenant to the same effect as one in the deed by which the property had been conveyed to S., to the effect that no trade or business should be carried on, but that the house should be kept as a private dwelling. Six years afterwards the plaintiff negotiated for a lease for eighty years of the same house, and a draft agreement was sent him by the lessor's solicitor which contained a provision that the lease should contain such covenants on the part of the lessee as were usually inserted by the lessor in the leases of his other houses in Cromwell Gardens. The plaintiff's solicitor then wrote for the form of lease used by S., and a copy of a lease containing the restrictive covenant was sent; and a lease was granted to the plaintiff containing a similar covenant. Afterwards S. entered into arrangements to sell to his co-defendants three of his other houses in Cromwell Gardens for the purpose of converting them into a hotel, and this action was brought to restrain the user of these latter houses otherwise than as private dwellings. And it was held by the Court of Appeal that the representations made by S. to the plaintiff as to the form of the lease, amounted not merely to a statement that that was the then form of lease, but to a collateral contract with the plaintiff that the neighbouring property of S. should continue to be managed on that footing; and (affirming the order of Bacon, V.-C.), that the plaintiff was entitled to an injunction restraining S. from authorizing any of his adjoining houses to be used for the purpose of trade. Cotton, L.J., said, however, that the injunction ought not to be extended so as to impose any liability on S. in case one of his tenants violated the covenant, and he did not bring an action against him.

NOTICE OF MOTION RETURNABLE ON A DAY THE COURT DOES NOT SIT.

In *Re Coulton*, *Hamburg* v. *Elliott*, 34 Chy. D. 22, a notice of motion was given, returnable "four days from the date of this notice, or so

soon after as counsel can be heard"; it was objected that the day on which it was returnable the court did not sit, and that the notice was therefore void; the Court of Appeal however overruled the objection.

COSTS—EFFECTS OF JUDICATURE ACT ON JURISDICTION TO AWARD COSTS.

The only point it is necessary to refer to *In re Mills' Estate*, 34 Chy. D. 24, is that regarding the effect of the Judicature Act on the jurisdiction to award costs. The application was one for the payment out of Court of the purchase money paid in under an Act authorizing expropriation of land, and the question was whether the commissioners authorized to make the expropriation could be ordered to pay the costs of the application. The Court of Appeal was clear that before the Judicature Act there was no jurisdiction to award cost against commissioners, and they were equally clear that the Judicature Act did not enable the Court to order costs as against persons, who up to the time of the passing of that Act, were not liable to be ordered to pay costs, following *Foster* v. *G. W. Ry. Co.*, 8 Q. B. D. 515, and overruling *Exparte Mercers' Company*, 10 Chy. D. 481. The order of Bacon, V.C., was therefore reversed.

COMPANY—DEBENTURES SEALED BUT NOT DELIVERED—DEBENTURES PAYABLE TO BEARER.

In *Mowatt* v. *Castle Steel and Iron Works Company*, 34 Chy. D. 58, the Court of Appeal affirmed a decision of Chitty, J., Debentures payable to bearer were prepared, sealed and stamped by the secretary of a company pursuant to instructions from the directors, for the payment of advances to the company. These were placed in a box, the key of which was kept by the secretary, and the box was deposited in the office of the company, which was also the office of T., one of the directors, who had made large advances to the company. Some of the debentures were given out by the secretary to an agent for him to issue to the public, which he did not succeed in doing. The company was ordered to be wound up, and after the commencement of the winding up the agent returned the debentures to T., who gave some of them to R. & Co., his own creditors, who took them, believing them to have been regularly issued to T., and that he had power to dispose of them. But it was held that the debentures had not been duly issued before the winding up, and that the other debenture holders of the company were entitled to dispute the validity of the debentures held by R. & Co.

WILL—POWER OF APPOINTMENT—GENERAL DEVISE AND BEQUEST—(R. S. O. c. 106, s. 29).

The case of *In re Jones*, *Greene* v. *Gordon*, 34 Chy. D. 65, turns upon the effect of the Wills Act, 1 Vic. c. 26, s. 27, from which R. S. O. c. 106, s. 29, is taken. A testator by his will, dated in 1884, after giving his residuary real and personal estate upon certain trusts for the benefit of his widow and his daughter, and the daughter's children, empowered his widow by will to appoint that any sum or sums of money, not exceeding £20,000, should be raised and applied as she should think fit. The widow by her will, dated in 1885, devised and bequeathed all her estate and effects, real and personal, which she might die possessed of or entitled to, unto her daughter absolutely; and the question was whether this general devise was under the statute to be construed as an appointment of the £20,000 in favour of the daughter; and Kay, J., determined that it was.

TRUSTEE—NEGLIGENCE—MORTGAGE OF HOUSES—VALUATION.

The well-worn subject as to the liability of trustees for investment of trust funds on insufficient security is again discussed by Kay, J., in *Re Olive*, *Olive* v. *Westerman*, 34 Chy. D. 70. In this case the trustees, having power to invest the trust funds on leaseholds, invested the money upon a mortgage of a leasehold property which consisted of cottages. The evidence showed that a proper valuation was not obtained by the trustees, and that the sum advanced was about two-thirds of the real value of the property, which subsequently became depreciated, and was subject to large outgoings for paving and sewering—under these circumstances Kay, J., held the trustees, though acting *bona fide*, had made an improper investment, and were liable for the loss.

SOLICITOR TRUSTEE—PROFIT COSTS.

In *Re Barber*, *Burgess* v. *Vinicome*, 34 Chy. D. 77, Chitty, J., had occasion to consider whether *Cradock* v. *Piper*, 1 Mc. & G. 664, is to be considered as overruled. In that case it may be remembered Lord Cottenham held that a solicitor trustee acting for himself and

co-trustee as defendants in an action, was entitled to recover profit costs. Some observations of Cranworth, L.C., and Lord Brougham in *Broughton* v. *Broughton*, 5 D. M. & G. 160, and *Manson* v. *Baillie*, 2 Macq. 80, were supposed to have thrown doubt upon Lord Cottenham's decision, but after examining the cases, Chitty, J., came to the conclusion that *Cradock* v. *Piper* stands unimpeached, and he, therefore, followed it. It further appears from this case that where a solicitor is witness to a will which appoints him trustee, and authorizes him to charge for professional services rendered the estate, that although such provision in his favour is nullified by the fact of his being an attesting witness; yet, notwithstanding, he is still entitled to charge profit costs in any case in which the law, irrespective of any such express provision in the will, would entitle him to charge them.

WILL—CONSTRUCTION — MARRIED WOMAN — RESTRAINT ON ANTICIPATION.

The only remaining case to be noticed is *In re Grey Acason* v. *Greenwood*, 34 Chy. D. 85. In this case a testator appointed that a sum of £1,500 should be raised and paid to his daughter absolutely for her separate use, with restraint on anticipation, and after appointing another specific sum, appointed one-fourth of the residue upon trust for the same daughter, absolutely for her separate use, with restraint on anticipation. The daughter was married, and she claimed that the share of the residue should be paid over to her, but North, J., was of the opinion that the restraint against anticipation could not be disregarded, and that the trustees were bound to retain the fund in their hands during her coverture, and pay her only the income as it accrued for her separate use. No question was raised as to the £1,500.

LAW SOCIETY.

TRINITY TERM, 1886.

The following is a *résumé* of the proceedings of Convocation on the 17th September, and of Michaelmas Term, 1886:

Convocation met.

Present—The Treasurer and Messrs. Britton, Falconbridge, Hoskin, Irving, Lash, Maclennan, Mackelcan, Morris, Moss, Murray and Smith.

The minutes of last meeting were read and approved.

Mr. Maclennan, from the Reporting Committee, presented their report to the effect:

1. Respecting the probable expense of a quarterly current index of the reports, similar to that lately commenced by the Council of Law Reporting in England.

2. That Mr. Grant has made an arrangement with Mr. B. Edward Brown to assist him in his work on the terms stated, and the Committee recommend that this arrangement be approved of by Convocation.

The report was ordered for consideration.

The first paragraph was read.

Ordered, That it be referred back to the Committee for reconsideration as to the estimate of cost, and to report their opinion as to a scheme for the proposed digest.

The second paragraph was read and adopted.

Mr. Irving, from the Library Committee, reported, That Mr. G. Mercer Adam had made application to them to recommend a grant being made to him upon the completion by him of the New Catalogue.

That Mr. Adam has been paid his contract price of $250, and the Committee have already certified to Convocation their satisfaction with the work.

That Mr. Adam grounds his application upon the labour expended by him being much in excess of his expectations.

That, upon enquiry, the Committee have ascertained that Mr. Adam, at the suggestion of the Librarian, added very much to the value of the catalogue, by adopting certain references which had not been given in the former catalogue, and which

may be said to have been the specification on which Mr. Adam's contract was based.

That under these circumstances, and recognizing the value of the improvements suggested by the Librarian and incorporated in the work, the Committee recommend that Mr. Adam be paid a bonus of $100.

The report was ordered for immediate consideration and adopted.

Ordered, That a bonus of $100 be given to Mr. Adam.

The Committee on Legal Education reported the applications for the position of Examiner and Lecturer in place of Mr. Delamere. Nominations were then made, and Mr. Kingsford was elected, his appointment to take effect from 1st October.

The second reading of Mr. Britton's rule as to Supreme Court Reports was moved, and was declared lost.

Convocation adjourned.

J. K. KERR,
Chairman Committee on Journals.

MICHAELMAS TERM, 1886.

The following gentlemen were called to the Bar, viz. :—

November 15th.—Robert Stanly Hays, Wellington Bartley Willoughby, Frederick Stone, Trevussa Herbert Dyre, Franklin Montgomery Gray, Edward Arthur Lancaster, Lorenzo Clarke Raymond, Delos Rogest Davis, John Michael Macnamara, Henry Clay, Eudo Saunders, Archibald McAlpine Taylor, Alexander Fraser.

November 16th.—William James Tremeear, John Robertson Millar, David Alexander Givens, George Francis Burton, Henry Smith Osler, Walter Stephens Herrington, Duncan Ontario Cameron, Osric Leander Lewis, Francis McPhillips, Frederick George McIntosh, Archibald McKechnie, Edward Ellis Wade.

November 20th.—Donald Calvin Hossack.

December 4th.—Herbert Henry Bolton.

The following gentlemen were granted Certificates of Fitness, viz. :—

November 15th.—A. M. Denovan, A. M. Taylor, O. L. Lewis, W. B. Willoughby, F. Stone, W. S. Herrington, R. Vanstone, R. F. Sutherland, A. Fraser, S. McKeown, C. B. Jackson, D. H. Cole, R. H. Pringle, A. B. Cameron, E. W. Boyd, F. E. Titus.

November 16th.—A. W. Wilkin, F. M. Gray, G. F. Burton, W. J. Tremeear, D. B. S. Crothers, H. G. Tucker, J. J. Smith.

November 20th.—H. Morrison, H. W. Bucke, F. G. McIntosh, N. J. Clarke, J. R. Shaw.

December 4th.—H. J. Dawson.

The following gentlemen passed the First Intermediate Examination, viz. :—

M. H. Ludwig, with honors and first scholarship, J. M. Palmer, with honors and second scholarship, E. H. Britton, with honors and third scholarship, S. A. Henderson, with honors; and Messrs. J. H. Hunter, S. D. Lazier, R. G. Smyth, H. H. Johnston, J. T. McCullough, A. Collins, E. E. A. Du Vernet, H. Harvey, J. Irving Poole, G. C. Gunn, W. A. Keans, R. L. Elliott, R. M. Macdonald, W. Pinkerton, G. D. Heyd, O. Ritchie, W. L. B. Lister, M. C. Bigger, R. L. Gosnell, H. E. McKee, R. O. McCulloch, F. J. Travers, H. F. Errett, M. F. Muir.

The following gentlemen passed the Second Intermediate Examination, viz. :

F. A. Anglin, with honors and first scholarship, W. S. Hall, with honors and second scholarship, J. T. Kirkland, with honors and third scholarship, N. F. Davidson and A. Morphy with honors; and Messrs. T. Scullard, H. S. W. Livingston, F. P. Henry, R. R. Hall, A. Saunders, F. A. Drake, H. R. Welton, J. M. Quinn, J. Y. Murdoch, A. F. May, W. L. M. Lindsay, D. R. Anderson, T. Browne, R. J. Maclennan, H. B. Smith, W. S. Turnbull, R. K. Orr, T. A. Wardell, H. N. Roberts, A. E. Trow, A. C. Camp, H. M. Cleland, W. W. Jones.

The following gentlemen were admitted into the Society as Students-at-Law:—

Graduates.

Bidwell Nicholls Davis, Robert Elliott Fair, Lennox Irving, Ralph Johnston Duff, Donald Roderick McLean, James Wilson Morrice.

Matriculants.

Frederick Billings, George Davidson Grant, William Alexander Baird, Henry John Deacon Cooke, Christopher Lucy, Louis Vincent McBrady, John Fleming-

ton Tannahill, Robert Talbot Harding, Alexander Robertson Walker, William Henry Williams.

Junior Class.

C. P. Blair, C. F. Maxwell, W. F. Langworthy, J. A. Harvey, G. B. Wilkinson, J. McBride, H. C. McLean, F. R. Blewett, J. B. Pattullo.

Articled Clerks.

T. H. Lloyd, J. Lennon, H. W. Maw.

MONDAY, 15TH NOVEMBER, 1886.

Convocation met.

Present—The Treasurer, and Messrs. Cameron, Falconbridge, Ferguson, Foy, Fraser, Hoskin, Kerr, Morris, Moss, Pardee and Robertson.

The minutes of last meeting were read and approved.

Mr. Moss, from the Committee on Legal Education, reported on the cases of Messrs. A. B. Cameron, E. W. Boyd, F. E. Titus, that their papers are now regular, and recommending that they receive Certificates of Fitness.

Ordered, That Messrs. Cameron, Boyd and Titus do receive their Certificates of Fitness.

The representation of the Examiners on the subject of their remuneration was received and read.

Ordered to be considered to-morrow.

The letter of the Assistant Secretary of the Hamilton Law Association was received and read.

Ordered to be considered to-morrow.

The letter of Mr. Walter Read, enclosing that of the Hon. Wm. McDougall, was read.

Ordered to be referred to the Finance Committee for full report.

TUESDAY, 16TH NOVEMBER, 1886.

Convocation met.

Present—The Treasurer, and Messrs. Bell, Cameron, Ferguson, Foy, Fraser, Hardy, Hoskin, Hudspeth, Kerr, Lash, Martin, Mackelcan, McMichael, Morris, Moss, Murray, Osler, Robertson and Smith.

Mr. Moss, from the Committee on Legal Education, reported on the petition of H. J. Dawson, that his examination for call be allowed, and that he be permitted to present himself for call to the Bar during Easter Term next.

Ordered for immediate consideration and adopted.

Mr. Moss, from the same committee, reported on the case of Mr. McLean, recommending that he be allowed to present himself for the Second Intermediate Examination in Easter Term next, and in case he then passes that examination he be allowed to present himself for Final Examination at the expiration of nine months from that time.

Ordered for immediate consideration and adopted.

Mr. Moss, from the same committee reported on the case of Mr. W. H. Sibley, recommending that his application be not granted, pending the disposal of the charges against him now before the Discipline Committee.

Ordered for immediate consideration and adopted.

The petition of the Law Students as to the Lending Library was received and read.

Ordered to be referred to the Library Committee for report to Convocation.

Mr. Robertson, from the Discipline Committee, reported on the petition of L. U. C. Titus, recommending that the prayer of the petition be refused.

Ordered for immediate consideration and adopted.

The representation of the Examiners was received and read.

Resolved, That there does not appear to Convocation to be any ground for increasing the remuneration of the Examiners and Lecturers.

Mr. Hoskin, from the Discipline Committee, reported on the case of Mr. W. H. Sibley, finding that the charges made have been substantiated, and recommending that his name be erased from the Books of the Society.

On motion, the report was received, and

Ordered to be considered at the last meeting of Convocation this Term.

Mr. Hoskin, from the same committee, reported on the case of Mr. King's complaint against Mr. Ryerson, that in their opinion a *prima facie* case has been shown for investigation, and recommended accordingly.

The report was received.

Ordered to be considered on the last day of Convocation for this Term.

Mr. Hoskin, from the Discipline Committee, in the matter of the complaint against A. D. Kean, presented their report that they are of opinion that a *prima facie* case has been made for enquiry, and recommending an investigation.

Ordered for immediate consideration and adopted.

Ordered, That the petition be referred to the Committee for investigation in the usual way.

The letter of the Assistant Secretary of the Hamilton Law Association, ordered to be considered to-day, was read and considered.

Mr. Mackelcan gave notice that he would, at the next meeting of Convocation, move for leave to introduce a rule amending the rule as to the distribution of the law reports.

SATURDAY, 20TH NOVEMBER, 1886.

Convocation met.

Present—Messrs. S. H. Blake, Cameron, Falconbridge, Ferguson, Foy, Irving, Kerr, Lash, Mackelcan, Maclennan, Morris, Moss and Murray.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The minutes of last meeting were read and approved.

Mr. Moss, from the Legal Education Committee, reported:

1. On the case of Thomas Urquhart, that they cannot recommend the allowance of the service in Manitoba of four months and twenty-two days, but recommend that after he has been re-articled and has served the four months and twenty-two days in Ontario, the matter be again brought up with the view that the allowance to him of the examination which he has passed should be favourably considered.

Mr. Mackelcan asked for leave in pursuance of notice given at the last meeting of Convocation, to introduce the following rule, viz.:—

That Rule No. 156, relating to the distribution of the Ontario Reports, be amended by adding to sub-section 9 of said Rule, the words following:—"And an additional copy to each of such County Libraries, where the County Law Association has fifty or more members who have paid their subscriptions, such additional copy to be supplied from and inclusive of the first volume of the present series of Appeal and Ontario Reports respectively."

Ordered, That the rule be read a first time.

The rule was read a first time, second reading ordered for 26th November inst.

Mr. Murray, from the Finance Committee, reported on the subject of the correspondence between the Solicitor and the Hon. Wm. McDougall, relating to his fees, and recommended that the ordinary fees be collected.

The Report was received, and ordered to be taken into consideration immediately.

The Report was adopted.

The Chairman read a letter from Mr. Richard Willcocks, addressed to the Secretary, dated 17th November, 1886.

The Secretary was directed to reply that the matters contained in the complaint of Mr. Richard Willcocks do not make out a case for action by the Law Society, The applicant's right to redress, if any, being by application or suit in the ordinary way to the courts.

Convocation adjourned.

FRIDAY, 26TH NOVEMBER, 1886.

Convocation met.

Present—Messrs. Britton, Cameron, Falconbridge, Hudspeth, Irving, Kerr, Mackelcan, McCarthy, Maclennan, Martin, Morris and Murray.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The minutes of last meeting were read and approved.

Mr. McCarthy gave notice that, at the next meeting of Convocation, he would move for the reconsideration of Mr Urquhart's case.

Mr. Maclennan presented the Report of the Reporting Committee:

1. They have great pleasure in stating that the work of reporting is well up, and it can hardly be said that there are any arrears which could be avoided by the reporters, and the Digests of completed volumes are all out.

2. Mr. Grant has brought up all arrears, and there are no Appeal Cases unreported but those which were delivered in the present month, with the exception of one delivered in September.

3. During vacation the committee was applied to by the County of York Library Association for another set of the Reports, it being found that one set was insufficient to meet the demands of the profession, and your committee took the steps of ordering the supply of another copy, including back numbers of current volumes, the Association taking the risk of the committee's action being approved and adopted by Convocation.

4. Your committee has made inquiry concerning the probable cost of preparing and supplying the profession with a quarterly index similar to that lately issued by the Council of Law Reporting in England, and your committee have ascertained that the probable cost, including printing and distribution, would be between $400 and $500 per annum.

5. A number of the Election Reports will be issued next month, and another in January.

The report was received and ordered for consideration.

The first paragraph was adopted.

Ordered, That the paragraph referring to the action taken by the committee in the matter of a second copy of the Ontario Reports for the County of York Law Association be considered, when Mr. Mackelcan's rule on a cognate subject comes up for a second reading.

Paragraph referring to the preparation of the Quarterly Index at a cost of $400 or $500 per annum was considered.

Mr. Martin gave notice that, on the last day of Hilary Term, 1887, he would move in the matter of publishing such an index as is described in the report.

Ordered, That Messrs. E. B. Brown and H. H. Macrae be paid the sum of $10 each for the trouble they have taken in supplying the Reporting Committee with information upon the subject of the proposed index to the Reports. Carried.

A statement, signed by A. F. Miller, as Secretary of the Trustees of the Toronto General Hospital, relating to the conduct of a solicitor respecting the will of the late Mr. R. B. Butland was read.

Mr. Cameron moved, seconded by Mr. Britton,

That as the whole of the facts and statements on which the Trustees base their suspicion of misconduct on the part of the solicitor have not been laid by the Trustees before Convocation, and as it is proper that Convocation should be satisfied whether the facts in evidence constitute merely professional misconduct cognizable by Convocation, or a more serious charge within the jurisdiction of the criminal courts, the Trustees be informed that Convocation deems it inadvisable to take action in the matter without a fuller statement of the facts. Carried.

Mr. Mackelcan moved the second reading of the following rule:

That Rule No. 156, relating to the distribution of the Ontario Reports, be amended by adding to sub-section 9 of said rule the following words:

"And an additional copy to each of such county libraries where the County Law Association has fifty or more members who have paid their subscriptions, such additional copy to be supplied from, and inclusive of, the first volume of the present series of Appeal, Ontario and Practice Reports respectively." Carried.

Mr. Mackelcan moved the third reading of above rule, which was carried.

The rule was read a third time and passed.

Mr. Martin moved, pursuant to notice, as follows:

That Rule 142 be hereby amended as follows: (*a*) "Clause 3, Sub-section E, is hereby amended by adding thereto immediately after the word 'library,' 'and in payment of the salary of a librarian or caretaker to such an amount as may be approved of by the County Libraries' Aid Committee.'"

(*b*) "Sub-section 9 is hereby amended by striking out all the words after the word 'thereafter,' and substituting the following: 'And provided that the Association shall have taken due and proper care of the books, and shall have maintained and kept the library in the Court House, or other place approved of by Convocation, in a proper state of efficiency, and have in all other respects complied with the requirements of the rules adopted from time to time by Convocation in relation to county libraries, and in case of default the annual grant shall be suspended either in whole or in part during such default at the pleasure of Convocation; provided

that, if the default shall consist merely of delay in supplying the requisite reports and information, the annual grant may be paid within three months after the receipt thereof, if so ordered by the County Libraries and Finance Committees.'"

(*c*) The following clauses shall be added immediately after Clause 10:

11. Whenever any library association, which has been established for two years and has regularly made the required return, and complied with the requirements of the rules, shall make it appear to the satisfaction of Convocation that such association is unable to purchase such reports or text books as are necessary to make the library thoroughly efficient and useful, having regard to the locality in which the library is established and the number of practitioners who are members thereof, Convocation may, on the report of the County Libraries Aid Committee, make a special grant either of books or money to such association, or may advance, by way of a loan without interest, to such association any sum not exceeding the estimated amount of the next three years' annual grants, and such loan shall be repaid out of future annual grants in such manner as Convocation shall direct; provided that security shall be given to the satisfaction of Convocation for the due expenditure of any money grant or advance.

12. An Inspector of County Libraries shall be appointed by Convocation. The duty of the Inspector shall be to report to Convocation annually on the condition of the books in each library, the custody thereof, the fitness of the rooms used for the libraries, and the manner in which the library is maintained, and such other matters as he shall be required by the County Libraries Aid Committee or by Convocation.

The Inspector shall be paid $—— for each annual report on each library, and Convocation may authorize the payment of such proportion, not more than one-half of the salary of the librarian of any library association, which may be reported on satisfactorily by the Inspector.

13. Convocation may furnish to each library such number of books for the use of students as may be required, the books so furnished to be kept by the librarian of each association, and students allowed to use the same on similar conditions to those in force from time to time in regard to similar books at Osgoode Hall.

The rule was read a first time, and ordered for a second reading on Saturday, 4th December next.

Convocation adjourned.

SATURDAY, DECEMBER 4TH, 1886.

Convocation met.

Present — Messrs. Cameron, Falconbridge, Foy, Hoskin, Irving, Lash, Maclennan, Martin, McCarthy, Morris, Moss, Murray and Osler.

In the absence of the treasurer, Mr. Irving was appointed chairman.

The minutes of last meeting were read, approved and signed by the chairman.

In the matter of W. H. S., Mr. Hoskin presented the report of the Discipline Committee, ordered to be considered today, and moved its adoption.

A letter from W. H. S. was read.

Ordered, That the consideration of the report be deferred until the first day of Hilary Term next, and that the Secretary do transmit to Mr. S. a copy of the charge and complaint, and the report of the committee thereon, in order to enable him to give an explanation, as he requests by his letter received this morning.

Mr. Moss, from the Legal Education Committee, reported on the case of Mr. F. A. Munson, recommending that he be required to enter into new articles for two months, and that upon his service under these articles being completed and duly proved, the matter be again brought before Convocation with a view to the favourable consideration of his case, the fact of his having passed his examination satisfactorily having been considered.

The report was received and adopted.

Mr. Moss, from the same committee, presented the following report:

The Committee on Legal Education beg to report that they have had under consideration the report of the Finance Committee with reference to the fees for Primary Examinations payable by Students-at-Law and Articled Clerks, which was referred by Convocation to this Committee to report their views.

The Committee understand that the recommendation of the Finance Com-

mittee is that any one who has passed the Primary Examination for Articled Clerks should be permitted at any time within five years thereafter to present himself for the Primary Examination for Student-at-Law, upon payment of a fee of $10; and in the event of his passing such examination, it is to be allowed to him without requiring to forego the time heretofore served by him under articles.

The Committee are of opinion that it would be reasonable to adopt the above view.

The report was received and, together with the report of the Finance Committee on the same subject presented to Convocation on 29th June last, was ordered for consideration forthwith and adopted.

Mr. Hoskin, in the absence of Mr. McCarthy, seconded by Mr. Murray, moved for the reconsideration of Mr. Urquhart's case, pursuant to notice duly given, and that Mr. Urquhart be granted a Certificate of Fitness.

The motion was lost.

The letter of the Secretary of the Hospital Trustees of 2nd December, 1886, addressed to the Secretary of the Law Society, acknowledging the letter of the 30th ult., enclosing a copy of the resolution of Convocation of the 26th ult. relating to the conduct of a solicitor in the matter of the will of the late R. B. Butland.

Ordered, That the letter of complaint of 24th November, 1886, and the letter of the Secretary of the Trustees of the 2nd inst., be referred to the Discipline Committee to report whether a *prima facie* case had been made out. Carried.

Mr. Martin, seconded by Mr. Moss, moved the second reading of the rule to amend Rule 142. Carried.

The rule was read a second time.

Mr. Martin, seconded by Mr. Moss, moved the third reading of said rule.

The rule was read a third time and passed.

Mr. Martin read a report from the County Libraries Aid Committee, relating to the Guelph Library Association, which was received, ordered for immediate consideration, and adopted.

Ordered, That the sum of eight hundred dollars ($800) be paid to the Wellington Law Association as an initiatory grant on compliance with the conditions contained in the report.

Mr. Kerr, from the Committee on Journals and Printing, reported the printed draft of the consolidated Rules of the Society.

The draft was received, read, and ordered to be reprinted for consideration at the next meeting of Convocation.

Mr. Moss, from the Committee on Legal Education, reported with reference to the new revision of the Statutes of Ontario, that it is advisable to suggest to the Commission of Revisers of the Statutes that a system of nomination papers of candidates at the regular general election of Benchers should be approved in accordance with the system pursued for the election of members to the Senate of Toronto University.

The recommendation in the report was approved.

Convocation adjourned.

J. K. KERR,
Chairman of Committee on Journals.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Q. B. D.] [Feb. 1.

BOWEN v. CANADA SOUTHERN RY. CO.

Railways—Expropriation—Damages—Leave of municipality—Reference.

The lands in question were lots 3, 4 and 6 in Clifton Avenue, in the town of Niagara Falls. The defendants had taken for the purposes of their railway, a small part of lot 3, and the plaintiff claimed damages for the injury caused to that lot and lots 4 and 6, by lowering the street in front thereof to enable the railway to be carried over the highway, in such a manner as to obstruct the plaintiff's access to his land.

Held (affirming the judgment of the court below), (1) upon the evidence, that the sum paid to the plaintiff for the part of lot 3 actually taken, included damages to lot 3, but not to lots 4 and 6. (2) That the claim as

to lots 4 and 6 was for damages suffered by land having been taken in the exercise of the powers granted for the railways, within the meaning of the Consolidated Railway Act, 1879, s. 9, s.-ss. 10 and 12 (D.).

Held, also, that there was nothing to exonerate the defendants in the fact that they had the leave of the municipality for doing as they did.

Held, also, that the court had no power to compel a reference to an officer of the court to ascertain these damages, but only to compel an arbitration, to which the plaintiff was entitled under the Act.

Quære, per OSLER, J.A.—Whether the compensation clauses of Part I. of the Consolidated Railway Act, 1879, apply to the defendant's railway; but held that they apply to the Welland Branch of the defendant's railway, on which the work in question was done?

Cattanach, for the appellants.

McClive, for the respondent.

Rose, J.] [Feb. 1.

PRESTON v. THE CORPORATION OF CAMDEN.

Drainage by-law—Damages—Lawful act done in negligent manner.

The defendants deepened and widened a drain through the plaintiff's land, and threw up the earth on either side, and left it there. The plaintiff sued for damages to his land, etc., by reason of such throwing up of the earth. It was admitted that the work was done under a by-law, passed under s. 576 of the Municipal Act, 1883, and it was not suggested that the by-law was defective in form or substance or for want of authority to pass it. The jury found that the defendants were not guilty of any negligence, but that the plaintiff had suffered damage by the execution of the work.

Held, reversing the decision of Rose, J., that upon these findings, judgment should have been entered for the defendants; that a cause of action could not accrue from the doing of a lawful act, unless in a negligent manner, and that the plaintiff's remedy, if any, was by arbitration to obtain compensation under the Municipal Act of 1883, s. 591.

Matthew Wilson, for the appellants.

Pegley, for respondent.

C. C. Kent.] Feb. 1.

STEINHOFF v. THE CORPORATION OF KENT.

Negligence.

The defendants were the owners of a bridge over a navigable stream, having in it a draw or swing to allow vessels to pass through. A horse of the plaintiff broke away from the person in charge of him, and ran from a distance of two miles to the bridge, reaching it in broad daylight just as the bridge was opened, rushed into the gap and was drowned.

Held (affirming the judgment of the court below), that the loss of the horse was owing to no negligence on the part of the defendant in failing to guard the approach to the bridge or to use signals, and the plaintiff could not recover.

J. S. Fraser, for appellant.

Pegley, for the respondents.

C. P. Div.] [Feb. 1.

MCGIBBEN v. NORTHERN AND NORTH WESTERN RY. CO.

Negligence—Fire from railway engine.

The judgment of the court below, 11 O. R. 307, was reversed on appeal.

The action was for negligence whereby, as alleged, fire escaped from the defendants' engine, and destroyed the plaintiff's property.

There was evidence that the engine had passed just before the fire in a certain manure heap (which communicated it to the destroyed property) was perceived; that a strong wind blew across the track towards the manure heap; that there was no other known source from which the fire was at all likely to have come; that the wind was in the wrong direction to have carried sparks from a steam sawmill close by, and that cinders were found in the straw by those who went to put out the fire.

Held, that from these facts the jury would clearly have been justified in finding that the mischief was caused by the engine.

The evidence further showed that the engine had run ninety miles without the ash-pan being emptied; that ignited substances were found upon the manure heap, which, being too large to pass through the net of the smoke-

stack, must have come from the ash-pan; that the ash-pan was perfectly good, and so constructed that it was very difficult for ashes to escape from it, and that the possibility of any escape would be prevented by emptying or partly emptying the pan.

Held, that the jury might have found as legitimate inferences of fact that the fire escaped because the pan was full, and that that result might, with reasonable care, have been avoided; there was, therefore, evidence of negligence to go to the jury, and the nonsuit was improperly entered.

Lash, Q.C., for the appellant.

Robinson, Q.C., and *Boulton*, Q.C., for respondents.

QUEEN'S BENCH DIVISION.

Armour, J.]

REGINA v. HEATH.

Criminal law—Canada Temperance Act, 1878—*Buyer of liquor—Aider and abettor.*

Held, that under the Canada Temperance Act of 1878, a buyer of liquor cannot, in respect of a sale made to him by a seller, be regarded as an aider and abettor, counsellor or procurer, and a conviction as such cannot be supported.

Delamere and *Milligan*, in support of motion.

J. S. Fraser, of Wallaceburg, contra.

O'Connor, J.] [January 27.

REGINA v. DUNNING.

Conviction—Weights and Measures Act, 1879—*Certiorari—Appeal to sessions—33 Vict. c. 27, s. 2—49 Vict. c. 49, s. 1—Imprisonment—Criminal charge—Evidence of accused.*

Upon a motion for a *certiorari* to remove a conviction under the Weights and Measures Act, 1879, for obstructing an assistant-inspector of weights and measures on the discharge of his duty.

Held, that when an appeal from a conviction has been had and heard at the general sessions of the peace, a *certiorari* may be moved for within six months after the order of sessions confirming the conviction, but in this case the right to *certiorari* is taken away by 33 Vict. c. 27, s. 2, supplemented by 49 Vict. c. 49, s. 1, and

Held, also, that the latter act applies to convictions made before it was assented to, as well as after.

Held, also, that magistrates have power to impose imprisonment in default of sufficient distress upon conviction for an offence under this act.

Held, also, that the offence was in the nature of a crime, as it was interfering with a public officer in the discharge of his duty, and might have involved a breach of the peace, and therefore the magistrates were right in rejecting the evidence of the defendant.

F. M. Macdougall, for the motion.

W. H. P. Clement and *W. J. Code*, contra.

O'Connor, J.] [February 3.

REGINA v. CYR.

Conviction—Keeping bawdy-house—Uncertainty—Place where offence committed—Forfeiture of penalty—32 & 33 Vict. c. 31, s. 17—Costs.

Upon a motion, on the return of a *habeas corpus* to discharge the prisoner, who was convicted of keeping a house of ill-fame.

Held, that the conviction was bad on the face of it for uncertainty in not naming a place where the offence was committed.

Held, also, that the conviction was defective because it did not contain an adjudication of forfeiture of the amount of the fine imposed. The Act 32 & 33 Vict. c. 31, s. 17, provides that the magistrate may condemn the party accused to pay a fine not exceeding, with the costs in the case, $100.

Held, that the meaning of this is that the amount of the costs in the case shall be deducted from $100, and the balance or difference shall be the utmost limit of the fine; and that the conviction in this case, being to pay the sum of $100 without costs, was therefore bad.

G. F. B. Johnstone, for the Crown.

Aylesworth, for the prisoner.

COMMON PLEAS DIVISION.

Mr. Dalton, Q.C.] [December 23, 1886.
Galt, J.] [February 3, 1887.

MASSIE v. TORONTO PRINTING CO.

Landlord and tenant—Attachment of debts—Rent—R. S. O. ch. 136, secs. 2-6—Mortgagor and mortgagee.

R. S. O. ch. 136, secs. 2-6. does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but works a severance where any third interest intervenes.

And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before the gale days had arrived,

Held, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order.

Quære, per GALT, J., Whether the rents could be garnished against a mortgagee of the landlord's?

F. J. Dunbar, for the plaintiff.
Ingles, for the defendants.

Cameron, C.J.]

RE HAMILTON AND MILTON ROAD CO. AND CORPORATION OF EAST FLAMBOROUGH.

Sale by one road company to another—Second company defectively organized—Minority of one of corporators—Sale abortive—By-law of municipality assuming road—Quashing same.

The H. and M. Road Co., the owners of a certain road and in possession thereof as a toll-road, levying and collecting tolls thereon, in 1879 assumed to sell the same to the H. and F. Road Co., who entered into possession thereof. Subsequently it was held by the Court of Appeal, on appeal from the judgment of WILSON, C.J., that the H. and F. Road Co. were not a duly incorporated company, because, while the Joint Stock Companies Act, R. S. O. ch. 152, required at least five corporators to enable a company to be incorporated, there were not five here—there being only four alleged corporators, and one of whom was a minor. The defendants thereupon passed the by-law in question, assuming possession of the road. On an application by the H. and M. Road Co. to quash said by-law,

Held, that the defendants' by-law was illegal and must be quashed: for that the effect of the judgment of the Court of Appeal was to restore to the applicants the franchises they held before the abortive sale took place—the road being kept alive as a toll-road, and repaired as such from time to time, and nothing transpired to justify the defendants in interfering with the road or assuming possession and control of it as the by-law authorized them to do.

Lash, Q.C., for the applicants.
Osler, Q.C., for the defendants.

Div'l Court.]

CITIZENS' INSURANCE CO. v. CLUXTON.

Principal and surety—Change in position of principal debtors — Release of surety—Renunciation clause—Joint contractors.

Action against defendants as sureties on a bond given to the plaintiffs to secure the faithful and diligent performance of B's (the principal) duties to the plaintiffs, including the paying over of moneys as to which there was alleged to be default. The bond, after reciting that B had been appointed agent for the defendant's company for the Province, and as such to discharge certain duties, and to receive certain moneys according to the definition of his duties contained in the instrument appointing him, dated 19th October, 1883, and as to which the parties thereby declared to have had due and sufficient communication. The condition was for the performance of such duties and payment over of moneys for which he should be responsible as such agent. The bond also contains the following clause: "And the said sureties in consideration of the premises hereby agree to waive any notice of any default the said B may at any time make in his duties as such agent, and to renounce to the benefits of division, discussion and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." The agreement provided that B should be general agent for the Province, should have control over all local agents, except some six agencies, including Hamilton and Galt, and his compensation

should be a commission of 35 per cent. on all business obtained by himself, or the agents under his control, he to pay the agents thereout, and a salary of $75 a month, which was to include travelling expenses, and in renewals 30 per cent. The plaintiffs afterwards added Hamilton and Galt to his agencies. Subsequently the minor agencies were taken away from B, and his business was confined to Toronto, and he relinquished his commission on all outside agencies; and it was intimated to him that at the close of the year his salary would have to be rearranged.

Held, that the taking away of the sub-agencies was such a change in B's position as could not be said to be without enquiry evidently unsubstantial and not prejudicial to the sureties, and would of itself discharge them; but as to adding Hamilton and Galt it could be said on the evidence to have such effect.

Held, also, that the effect of the renunciation clause was to place the principal and sureties in the position of joint contractors; that the agreement confining B's business to Toronto amounted to a new contract, and that the sureties would only be liable for default up to the date of such new contract, but not thereafter.

Robinson, Q.C., for the plaintiff.

Moss, Q.C., and *Drayton*, for the defendants.

CHANCERY DIVISION.

Proudfoot, J.]

COATES ET AL. v. COATES.

Contract—Specific performance—Statute of Frauds—Part performance—Requisites to take out of the statute.

A brought an action against B for the rents and profits of certain lands which had belonged to the father of A and B, who died intestate, and which B had taken, and had possession of for several years. On the action being entered for trial a settlement was arrived at, by which the action was to be stayed upon the undertaking of B to obtain certain releases, etc. B's counsel appeared in court when the action was called for trial, and stated that it was settled, and an entry was made in the minute that the case was "settled out of court." Subsequently B required certain releases to be obtained by A, which A agreed to procure. B obtained such releases, and complied with all his conditions, and A refused to complete the agreement.

In an action by A to compel B to perform the agreement, in which B set up the Statute of Frauds,

Held, that the staying of the action was a sufficient part-performance to withdraw the contract from the operation of the statute as being (1) an act referring to a contract consistent with the alleged one. (2) It would lead to fraud to allow the defendant to escape from performance because the contract was not in writing. (3) The contract was such a one as would have been enforced had it been in writing; and (4) The contract was fully proved.

Aylesworth, for the plaintiff.

J. K. Kerr, Q.C., and *Cassels*, for the defendants.

Divisional Court.] [January 8.

THE TORONTO BREWING AND MALTING CO. v. HENRY.

Surety—Representation on which bond executed—Jury findings.

The defendant agreed to become security with McG. for McB. to the plaintiffs. Plaintiffs' solicitor sent two bonds to their agent for execution, one by defendant and the other by McG. The agent attended defendant to get his bond executed, and in answer to a remark of defendant's (made before he signed the bond) that McG. had promised to sign a bond too, told him that a bond had been sent up to be signed by McG. Defendant then signed the bond, but McG. subsequently refused to sign his.

The jury found that a statement was made, leading defendant to suppose that the bond executed was conditional upon the execution of the proposed bond from McG., and that its execution was obtained by a false, although unintentionally so, representation.

Held (affirming O'CONNOR, J.), that the plaintiffs could not recover.

Maclennan, Q.C., and *Kingsford*, for plaintiffs.

R. Meredith, for defendant.

PRACTICE.

Proudfoot, J.] [February 4.

HOGG v. CRABBE.

Costs—Taxation—Costs of the day—Counsel fee.

Under an order made at the assizes postponing the trial upon payment of "the costs of the day," the party receiving the costs is entitled to tax only one counsel fee of $10.

H. J. Scott, Q.C., for the plaintiff.

Middleton, for the defendants.

COUNTY OF YORK LAW ASSOCIATION.

The members of the Association met at the Convocation Hall of Osgoode Hall on the 7th inst., to hold their annual meeting. The annual report of the trustees for the year 1886 was read, and is as follows:—

Under the terms of the Memorandum of Association the Board of Trustees met on the fourth of January, 1886, and elected Mr. B. B. Osler, Q.C., President of the Association; Mr. J. K. Kerr, Q.C., Vice-President; Mr. Walter Barwick, Treasurer; Mr. E. D. Armour, Curator; and Mr. Alex. Monro Grier, Secretary; and these members of the Board have performed the duties of their respective offices during the past year.

At a subsequent meeting of the Board by-laws were passed for the due regulation of the affairs of the Association, and these by-laws are now submitted for your approval pursuant to the provisions of the Memorandum of Association.

The attempt to procure funds for the establishment of a library has been attended with very gratifying success. The sum of $642 was donated to the Association by various members, and the sum of $1,518 has been paid in upon account of stock subscriptions and annual fees. Application was made to the Law Society for an initiatory grant under the rules relating to the county libraries, but for the reason set forth in a report to the Law Society which is printed in the CANADA LAW JOURNAL for 1886, at page 340, the grant from the Law Society was limited to $1,500, and the committee decided to limit the annual grant to the Association for the present to a sum equal to the amount of the annual fees paid by members. Arrangements have been entered into for the purchase of books at advantageous rates, and several sets of Reports have been secured at very low prices. The library now comprises 1,128 volumes, and is valued at over $3,000.

The Trustees have been fortunate in securing the services of a most efficient librarian, whose labours during the past year are deserving of great commendation.

In entering upon arrangements for the purchase of books for the library the Board decided to limit their selection of books to those in common use at *Nisi Prius*, and the making such a selection seemed in the first instance to be an easy task, but the variety of legal business conducted at the Court House is so great that the Trustees have experienced much difficulty in choosing books which are most commonly required by members of the Association.

During the progress of trials the applications made by the judges and counsel for books not in the library were found to be so frequent that the librarian undertook the keeping a list of books which were not in the library, and the books most frequently applied for have been purchased. It is still evident that the stock of books must be largely increased before the Association can be deemed to possess a fair *Nisi Prius* library.

The librarian has for several months been engaged in correcting the text books by the addenda and corrigenda tables usually published in standard works, and in noting the reported cases followed, overruled and commented upon in later reported cases, and is about to establish an index to current legal periodicals. This is a plan which is pursued in the most elaborate manner in many of the principal law libraries of the United States, and if carefully followed in the Association's library will immensely increase its usefulness.

The work already done by the librarian in following this plan has brought about the constant use of the library for reference purposes, and so many demands are now made for books useful to members who devote their attention more particularly to solicitors' work, and which are not in the library, that the Trustees find that their original scheme for the purchase of books must be considerably extended.

The Trustees hope that successive Boards will continue and improve upon these schemes for rendering the library more useful for reference purposes.

The daily attendance in the library evidences the necessity for its establishment.

The purpose, however, of the Association is not only the formation of a library, but also to promote the general interests of the profession, and to this end the Association might well bend its energies. The Trustees suggest that an early endeavour be made to bring about a meeting at some central point of delegates from the various County Law Associations in the Province for the purpose of discussing matters of general interest to the profession.

They suggest also the appointment of a committee on legislation, composed of members in active practice, whose suggestions would have weight with the Attorney-General of Ontario, and with the judges of the Supreme Court of Judicature in the consideration of required legislation and proposed amendments to the rules relating to practice.

The Trustees further suggest the adoption of some method of gathering together and preserving materials and records relating to the history of the Bar of this county.

Some interesting portraits have been presented to the Association during the past year, and others have been promised. The publication of a series of articles in the *Magazine of Western History*, entitled "The Bench and Bar of Toronto," by Mr. D. B. Read, Q.C., a member of this Association, indicate the existence of much material which

if not preserved will, in the course of a few years, be irretrievably lost.

The Trustees suggest to the members the appointment of an historian to the Association.

The Trustees have to record the death of one member of the Association during the past year—Mr. Davidson Black—a rising member of the Bar, and one whose memory will last long with those who knew him intimately.

The Trustees submit for the consideration of their successors in office the establishment of an Insurance Fund, based in principle upon the fund lately established with success by the Toronto Board of Trade.

The Trustees are indebted for many valuable suggestions made to them during the past year by His Honour Judge Macdougall, who has taken constant interest in the purposes and welfare of the Association.

The Association now numbers 216 members. A list of those who became stock-holders during the year 1886 is submitted herewith. A catalogue of the books and periodicals contained in the library, and detailed statements of the assets and liabilities of the Association at the date of the Report, and of the receipts and disbursements on account of the Association during the year are submitted for your consideration.

The Treasurer's accounts have been duly audited and the Report of the Auditors will be submitted to you for approval.

The Trustees, in retiring from office, beg to congratulate the members upon the success which has attended the establishment of the Association.

No. 1.—*Statement of Receipts and Expenditure for the Year ending 31st December*, 1886.

Dr.

FOLIO.	PARTICULARS.	AMOUNT.
23	Reports and Statutes	$2,262 55
29	Text Books	684 77
33	Periodicals	99 50
37	Binding	53 91
41	Furniture	45 05
43	Expenses	486 07
52	Dominion Bank	666 56
	Cash on hand	53 50
		$4,351 91

Cr.

1	Stock Subscriptions	$1,085 00
5	Annual Fees	433 00
15	Donations	641 00
21	The Law Society (Initiatory grant)	1,500 00
105	Carswell & Co	691 91
		$4,351 91

No. 2.—*Statement of Assets and Liabilities on 1st January*, 1887.

ASSETS.

Reports and Statutes	$2,316 46
Text Books	684 77
Periodicals	99 50
Furniture	45 05
Cash on hand and in Bank	720 06
	$3,865 84

LIABILITIES.

Stockholders	$1,085 00
Carswell & Co	691 91
Profit and Loss Account, 1886	2,088 93
	$3,865 84

No. 3.—*Profit and Loss Account*, 1886.

Dr.		Cr.	
Expenses	$486 07	Annual Fees	$433 00
Balance	2,088 93	Donations	642 00
		Law Society	1,500 00
	$2,575 00		$2,575 00
		Balance	2,088 93

Walter Barwick,
Toronto, December 31, 1886. *Treasurer.*

Moved by Mr. C. H. Ritchie, seconded by Mr. G. F. Shepley, and resolved, That a committee on legislation be appointed by this Association for the ensuing year, whose duty it shall be to consider from time to time what changes in or amendments of the laws, rules of court or practice, may, in their opinion, be desirable, and to submit their views thereon in the proper quarters, and to use their efforts to have same carried into effect; also to make such suggestions in regard to proposed legislation as they may deem advisable, and that such committee be composed of the following persons: Charles Moss, Q.C., John Hoskin, Q.C., J. H. Macdonald, Q.C., Z. A. Lash, Q.C., A. H. Marsh, E. Douglas Armour, and D. E. Thomson.

The following officers were elected for the ensuing year:—President, B. B. Osler; Vice-President, J. K. Kerr, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Trustees, W. Lount, Q.C., C. H. Ritchie, Q.C., G. F. Shepley, G. T. Blackstock and A. H. Marsh; Secretary, A. H. Grier.

Moved by Mr. Bigelow, and carried unanimously, that Mr. D. B. Read, Q.C., be appointed historian.

Moved by Mr. Ross, seconded by E. D. Armour, and resolved, That the Board take early measures to bring about a meeting of delegates from the various County Law Associations in the Province, for the purpose of discussing matters of general interest to the profession.

Moved by W. H. Cassels, seconded by Mr. N. W. Hoyles, and resolved, That this Association desires to place on record its appreciation of the earnest and close attention which has been given by the retiring Board of Trustees to the management of the affairs of the Association, and to congratulate the Trustees upon the great measure of success which has attended their efforts. The Association also desires to thank most warmly His Honour Judge Macdougall for his valuable co-operation with the Board of Trustees in their endeavour to promote the welfare of the Association.

Canada Law Journal.

VOL. XXIII. MARCH 1, 1887. No. 5.

DIARY FOR MARCH.

1. Tues .....Sittings of Court of Appeal, and sittings C. C. of York for trials begin.
5. Sat .....Holt, C.J., died 1710, æt. 68.
6. Sun .....*2nd Sunday in Lent.* Lord Chan. Hardwicke, died 1764, æt. 74. York changed to Toronto, 1834.
13. Sun.. .....*3rd Sunday in Lent.* Lord Mansfield born, 1704.

TORONTO, MARCH 1, 1887.

A NEW work on the Election Laws of the Dominion and of the several Provinces, affecting returning officers and their deputies, the qualification and disqualification of candidates, voting by ballot and *fac similes* of ballots, the law of election agency and of corrupt practices at elections, and the practice and procedure at election trials is announced under the authorship of Mr. Thomas Hodgins, Q.C. The work is expected to be published in time for the election trials arising out of the recent Local and Dominion elections.

UNLAWFUL VOTING AT ELECTIONS.

WE give in this number of the LAW JOURNAL a report of the case of *Reg.* v. *Sturdy*, tried at the Huron assizes of 1882, before Chief Justice Wilson, for the offence of unlawful voting at an election for the House of Commons under the Dominion Elections Act of 1874. The report includes a copy of the indictment—the first precedent of its kind—obtained from the crown counsel at the assizes in question, and the shorthand reporter's notes of the proceedings at the trial.

In the case reported it appears that the defendant had become disqualified as a voter by his removal from the constituency; and, as contended by his counsel, it was only by implication that he was prohibited from voting. The learned judge, however, overruled the demurrer, and held that an unqualified person voting at an election was guilty of an indictable offence. Non-residence is now under the Ontario Franchise Act a universal disqualification at legislative elections; and by 47 Vict. c. 4, s. 4 (O.) all unqualified persons voting at such elections are liable to the following punishment as well as to indictment for misdemeanour: "any person who votes—or induces or procures any person to vote—at such election, knowing that such person has no right to vote at such election, shall be guilty of a corrupt practice, and shall be liable to a penalty of $100."

A question was raised at the late Dominion elections whether deputy-returning officers and poll clerks were disqualified under the comprehensive words of section 11 of the Dominion Franchise Act, which prohibits persons who receive pay for election services voting at an election. It was contended that the deputy of the returning officer came within the disqualifying clause, on two grounds—first as included in the term "Returning Officer," since the Interpretation Act, 31 Vict. c. 1 (D.), provides that words applying to a public officer or functionary by his name of office shall include his "lawful deputy;" and secondly, that the disqualification covered all persons employed for reward in any capacity whatever at the election. It was further contended that poll clerks were within the latter disqualification, and also within the term "clerk," used in the section. We express no opinion on the

questions of law involved in the above contentions, as the elections are now over; and before the next general election the question may be set at rest, either by judicial decision or legislative enactment.

RECENT ENGLISH DECISIONS.

The *Law Reports* for February comprise 18 Q. B. D. pp. 161-314; 12 P. D. pp. 29-45 and 34 Chy. D. pp. 85-216.

PRACTICE—DISCOVERY—INSPECTION OF PROPERTY—CO-DEFENDANTS—ORD. 50 R. 3: ORD. 31 R. 12. (ONT. RULES 398, 222.)

In *Shaw* v. *Smith*, 18 Q. B. D. 193, the Court of Appeal was called on to construe Ord. 50 r. 3 (Ont. R. 398), which provides that it shall be lawful for the court or a Judge upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for (among other things) the inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein. Ord. 31 r. 12 (Ont. Rule 222) provides that "any party" may apply for an order directing "any other party" to any cause or matter to make discovery. Under this last rule it was held in *Brown* v. *Watkins*, 16 Q. B. D. 125, that discovery could not be ordered except as between opposite parties. This action was brought against the defendant, Smith, for breach of a covenant for quiet enjoyment, and against the other defendants for letting down the surface of plaintiff's land by working their mines. Smith obtained an order to inspect the mines of his co-defendants under the plaintiff's lands and the land adjoining thereto. It was contended on the appeal from this order that the court had no jurisdiction to make such an order as between co-defendants, between whom no issue was pending, and the Court of Appeal (overruling the Divisional Court) held that this contention must prevail; *Brown* v. *Watkins* was explained, and the words "opposite party" used in that case were stated to include co-plaintiffs, or co-defendants, as between whom any question was in conflict in the action.

STATUTE OF LIMITATIONS (21 JAC. 1 c. 16)—DEATH OF DEFENDANT PENDING ACTION—FRESH ACTION AGAINST EXECUTORS.

In *Swindell* v. *Bulkeley*, 18 Q. B. D. 250, the Court of Appeal declined to depart from the long established, but what they admitted was a forced construction of the Statute of Limitations, 21 Jac. 1 c. 16, whereby, in the event of a defendant dying, pending an action, the plaintiff has been held entitled to bring a fresh action within a reasonable time, against the deceased defendant's personal representative, notwithstanding that in the meantime the period of limitation under sec. 3 had expired. In this case an action was commenced on a bill of exchange against the acceptor within the six years by the issue of a writ. The writ, however, was not served, and the defendant died before the six years had expired. Before the six years had expired his will was proved. About six months after this, and about a month after the expiration of the six years, the plaintiff brought the present action against the executors, and it was held that it was in time.

Lord Esher, M.R. at p. 253, says:

> The rule was, that where an action was commenced within the period of limitation, and the defendant died, then the plaintiff had a right to bring a new action against the executor or administrator, if he did so in a reasonable time. That is what has happened here.

The court was unanimous that the provisions of the Judicature Act for the continuing of proceedings in the event of the death of a defendant did not warrant any alteration in the interpretation to be placed upon the statute.

PRACTICE—PARTICULARS—ALLEGED FALSE ENTRIES.

None of the cases in the Probate Division seem to require notice here; we therefore proceed to the cases in the Chancery Division. The first to which we think it necessary to call attention is *Newport Slipway Dry Dock Co.* v. *Paynter*, 34 Chy. D. 88. In this case a question of practice is discussed. The plaintiffs had bought a business from the defendants and employed them to manage it, the defendants guaranteeing that the profits would amount to a certain yearly sum. The statement of claim alleged that the defendants had made false entries in the books for the purpose of making the working expenses appear less

than they actually were in order to relieve themselves from their liability on the guarantee. The defendants obtained an order for the delivery of particulars of the alleged false entries. The plaintiffs delivered a list of the items complained of. The defendants moved for further and better particulars. Kay, J., refused the application, but, on appeal, the Court of Appeal held that an entry might be wrong in different ways, and that the mere specification of the entries complained of did not give the defendants sufficient information, and that the plaintiffs must state shortly as to each item the general nature of the objection they made to it.

BANKER—DEPOSIT BY MONEY DEALER OF CUSTOMERS' SECURITIES—NEGOTIABLE SECURITIES—PURCHASE WITHOUT NOTICE.

In *Easton* v. *London Joint Stock Co.*, 34 Chy. D. 95, the question involved was the right of the defendants to hold certain securities which had been pledged with them by a money lender, as against the owner thereof. The plaintiff, S., had given to his co-plaintiff, E., certain bonds which were made payable to bearer, for the purpose of raising money thereon by way of mortgage, and E. deposited the bonds with a money lender named Mozley for the purpose of his raising money on them from joint stock banks. Mozley obtained an advance from the defendants by depositing the securities, together with the securities of other customers, with them. He, Mozley, soon afterward became bankrupt, and the defendants claimed to hold the bonds as security for all the debt due from Mozley to them. It was found by the court that the plaintiff, E., had notice of the course of dealing between Mozley and the defendants, under which he had been accustomed to deposit securities of his customers *en bloc* to secure advances, and it was held that although S. did not authorize E. to deal with the securities otherwise than by way of mortgage, yet as he had executed the transfers in blank, and had handed the bonds to E. transferable by delivery, he was estopped from objecting to the defendants' legal title; and that the defendants having obtained the bonds in the ordinary course of dealing with Mozley, without any reason for suspecting that he was exceeding his authority, were purchasers for value without notice, and were entitled to hold them as security for all the debt due by Mozley to them.

PRACTICE—COSTS—APPEAL FOR COSTS—ADMINISTRATION ACTION.

Williams v. *Jones*, 34 Chy. D. 120, was an action brought by a residuary legatee against an executor and trustee for administration alleging certain misconduct. On taking the accounts, it appeared that the defendant before action had given a correct account of the capital, but that in the accounts he had rendered of the income he had not accounted for nearly as much as he ought. The special charges of misconduct, however, were not substantiated. Kay, J., ordered that the plaintiff's costs relating to the income account and the defendant's costs of the rest of the action should be taxed and set off against each other. The plaintiff appealed; but it was held that the order was not appealable, for that the costs of a hostile action seeking to charge the defendant with costs on the ground of acts of misconduct, were not within the old rule of the Court of Chancery that the plaintiff in an administration action was entitled to costs out of the fund, unless there were special grounds for depriving him of them, but were in the discretion of the Judge.

CHOSE IN ACTION—EQUITABLE ASSIGNMENT.

The only point for which we think it necessary to mention *Gorringe* v. *Irwell India Rubber Company Works*, 34 Chy. D. 128, is that a memorandum delivered by a joint stock company to their creditors to the following effect: "We hold at your disposal the sum of £425 due from Messrs. C. & Co. for goods sold and delivered by us to them up to 31st Dec., 1884, until the balance of our acceptance for £660 has been paid," was held to constitute an immediate equitable assignment of the debt of £425, and was valid as against the assignors without notice to C. & Co.

Bowen, L.J., says at p. 135.

The rule that notice of the assignment of a chose in action is necessary is a rule as between the different incumbrancers; but there is no necessity for such notice as between the assignor and the assignee.

The fact that the company was ordered to be wound up before notice of the assignment was given to C. & Co. was held to make no difference in the right of the assignees, and it was held that it was not a disposition of the company's property made between the commencement of the winding up and the order for winding up, within sec. 153 of the Companies Act, 1862.

Recent English Decisions.

Tenant for life—Remainderman—Repairs—Power of sale—Discretion of trustee.

In re Courtier, Coles v. *Courtier*, 34 Chy. Div. 136, some questions of interest arose as to the relative rights of a tenant for life and remainderman. A testator gave leaseholds, some of which were for short terms, to two trustees, one of whom was his wife, upon trust for his wife for life, and after her death upon trust that the whole should be sold, and the proceeds divided between four persons: and he authorized his trustees, if they should think it advisable, to sell his short leaseholds, and to invest the proceeds and allow his wife to receive the income during her life.

The leaseholds were in bad repair at the testator's death. The widow kept them up in the same state of repair, but declined to do more than this. The remaindermen sought to compel the widow personally to maintain the leaseholds in such a state of repair as to satisfy the covenants of the lease, so as to avoid forfeiture, or else to concur in selling the short leaseholds. But the Court of Appeal held (affirming Bacon, V.-C.) that the widow was under no obligation to put the premises in such a state of repair as to comply with the terms of the leases. And although the widow had become the surviving trustee the court held that it had no power to interfere with her discretion by ordering a sale of the leaseholds without her consent.

With regard to the first point, Cotton, L.J., thus lays down the law at p. 139:

> It is said that if the widow is to have the right to possess the leaseholds in specie during her lifetime she is bound to spend her money in putting them into sufficient repair to satisfy the covenants of the leases. I think that there is no such obligation on her. She is not bound to the landlords under the covenants; the trustees are bound, and it is their duty to repair the houses in accordance with the covenants in the leases out of the corpus of the estate. There is no rule of law that the tenant for life is bound to do these repairs out of the rents and profits. She is to enjoy the leaseholds in specie, but she is under no covenants to repair, and there is nothing in the will to show that the testator intended her only to have the net rents after making provision for the liabilities that arose in the testator's lifetime. . . . The appellants relied on *Re Fowler*, 16 Chy. Div. 723. But that was a very different case, and the question which arose there does not arise here. Here it is not a question whether the trustees are bound to keep up the houses, but whether the tenant for life is bound.

As to the second point, he says at p. 141:

> It is clearly settled law that where the trustees have a power, as distinguished from a trust, although the court will prevent them from executing the power unreasonably, it will not oblige them to exercise it.

Mortgage—Foreclosure—Moneys in hands of receiver.

In *Coleman* v. *Llewellin*, 34 Chy. Div. 143, the plaintiff had obtained a judgment for redemption or foreclosure, and for the appointment of a receiver. The judgment provided that any persons redeeming, or, in the event of foreclosure, the plaintiff, should be at liberty to apply for payment of the funds in court or in the hands of the receiver. At the date appointed for redemption there was money in court, and in the hands of the receiver paid under a mining lease since the report. North, J., had held that the plaintiff must have a new account taken, and a new day appointed for redemption; but the Court of Appeal considered the special provision in the judgment as to the moneys in question distinguished the case from *Jenner-Fust* v. *Needham*, 32 Chy. D. 582, by which North, J., considered the case governed, and overruled his decision, holding the plaintiff entitled to a final order, and to payment of the moneys in court and in the hands of the receiver without any further account.

Directors—Payment by directors of debt due to themselves—Preference—Debenture holder.

In *Wilmott* v. *London Celluloid Co.*, 34 Ch. D. 147, the plaintiffs were mortgage debenture holders of a joint stock company, whose mortgages provided that they should be a charge upon all the property of the company, but that the company might, in the course of its business, deal with the property charged as the company should think fit. The action was brought against the directors and company to compel the former to account for a sum of £3,000 which they had received under the following circumstances: The company was indebted to the directors for advances. In September, 1884, the company's premises were burned down, and an insurance company admitted their liability to pay £3,000 in respect of the damage. The directors held a meeting, passed a resolution for commencing an action against the company for their advances, and for instructing the company's

solicitors to appear for the company, and consent to an immediate judgment, which was done. A garnishee order was then obtained against the insurance company, under which the £3,000 was paid to the directors, and applied in part payment of the debt due to them by the company. It was held by the Court of Appeal (affirming Bacon, V.-C.) that the transaction did not constitute a fraudulent preference, and that as it was a payment of a just debt while the company was a going concern, it was a dealing by the company in the course of business within the condition of the debentures.

SOLICITOR'S LIEN—FUND RECOVERED—PRIORITY OF LIEN—DISCHARGED SOLICITOR.

In *Re Wadsworth, Rhodes* v. *Sugden*, 34 Chy. D. 155, Kay, J., held, following *Cormack* v. *Beisly*, 3 D. G. & J. 157, that when a solicitor is discharged by the client in an action before judgment, and the action is continued by another solicitor, and a refund recovered therein, the lien of the latter solicitor for his costs is entitled to priority over that of the discharged solicitor.

WILL—EXERCISE OF SUPPOSED POWER—ELECTION.

In re Brooksbank, Beauclerk v. *James*, 34 Chy. D. 160, is an illustration of a somewhat curious phase of the doctrine of election, which Courts of Equity have established. In this case a testatrix, assuming herself to be entitled to a power of appointment, which in fact she did not possess, by her will assumed to exercise it in favour of certain named persons, and by the same will gave to J., one of the persons entitled to the property she had assumed to appoint, certain other property over which she had a right of disposal. It was held by Kay, J., that the devisee, J., was bound to elect whether he would take under or against the will, and if under the will, he must confirm the appointment.

VENDOR AND PURCHASER—CONTRACT BY TESTATOR TO SELL LAND—DEFECTIVE TITLE—CONVERSION.

The only point we think it necessary to notice in *Re Thomas, Thomas* v. *Howell*, 34 Chy. D. 166, is that relating to the equity doctrine of conversion. A testator had entered into a contract to sell a parcel of land, and died before completion. The title was found bad as to a large part of the property, and the trustees of his will cancelled the contract. It was held by Kay, J., that the contract having proved abortive did not effect an equitable conversion of any of the property comprised therein.

Kay, J., says on this point, at p. 170:

> The title being bad at the time of the testator's death, and not having been accepted by the purchaser in the testator's lifetime nor since his death, and the contract itself having been rescinded because of its invalidity, I am of opinion that the contract did not effect any conversion of the estate in equity.

PRACTICE—IRREGULARITY—SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

In *Petty* v. *Daniel*, 34 Chy. D. 172, Kay, J., held that irregularities in proceedings might, if the court sees fit, under Ord. 70, r. 1 (Ont. R. 473) be condoned. And also that a summons or notice of motion to set aside proceedings for irregularity should state the several objections on which the applicant intends to insist (see Rule 107, T. T. 1856, Holmested's Rules and Orders, p. 523). An order for an attachment had been obtained on proceedings which the court held to be irregular, and the defendant had been arrested thereunder, but under the circumstances the court refused to set aside the order; but in the exercise of its discretion discharged the defendant from prison, making no order as to costs.

VENDOR AND PURCHASER—CONTRACT—STATUTE OF FRAUDS—VENDOR—COSTS.

The case of *Jarrett* v. *Hunter*, 34 Chy. D. 182, is somewhat similar in its circumstances to *Wilmot* v. *Stalker*, 2 Ont. R. 78. The action was for specific performance of a contract for the purchase of lands. The memorandum in writing stated that "G. S. Lawson, as the solicitor for the vendor, and the said R. Hunter, do hereby respectively agree to and with each other to complete the sale agreeably to the conditions." The name of the vendor was not disclosed, but one of the conditions of sale provided for the delivery of an abstract of title commencing with a specified deed. It was proved that at the auction at which the defendant purchased, Lawson informed him that he (Lawson) was the beneficial owner of the property. But it was held by Kay, J., that the contract was invalid under the Statute of Frauds for omitting the name and description of the vendor; and that the deeds mentioned in the abstract re

ferred to in the conditions of sale could not be looked at for the purpose of supplying the defect. He further held that the parol statement at the time of the sale as to Lawson being the beneficial owner did not cure the defect in the written contract; it was, nevertheless, a ground to induce the court to withhold costs from the defendant.

SPECIAL POWER OF APPOINTMENT, EXERCISE OF—GENERAL DEVISE—WILLS ACT (1 VICT. C. 26), S. 27. (R.S.O. C. 106, S. 29.)

In *Re Mills*, *Mills* v. *Mills*, 34 Chy. D. 186, Kay, J., had to consider the effect of the Wills Act s. 27 (R. S. O. c. 106 s. 29), in regard to special powers of appointment; and he held that the question whether a special power of appointing real estate is exercised by a general devise, where the testator had neither at the date of his will nor of his death any real estate of his own, is one of intention to be inferred from the words of the will and from the surrounding circumstances at the date of it, having regard to the enlarged operation given by the Wills Act to a general devise, and he came to the conclusion that the mere making of a general devise by a testator, though having no real estate of his own, does not sufficiently indicate an intention of exercising a special power of appointing real estate, notwithstanding that objects of the power happen to be included among the devisees.

STAYING ACCOUNTS, DIRECTED BY JUDGMENT.

The plaintiffs in *Exchange and Hop Warehouses* v. *Association of Land Financiers*, 34 Chy. D. 195, brought the action against the defendant company, which was in liquidation, for the rescission of a contract which the plaintiffs had entered into for the purchase of certain property of the defendant company. The judgment set aside the sale, and directed accounts of the amounts expended by the plaintiffs in respect of the property, which the defendants were ordered to pay, and the plaintiffs were declared to have a lien for the purchase money, and what might be found due on the taking of the accounts, and on payment thereof the plaintiffs were to discharge their lien. The plaintiffs applied to stay the taking of these accounts on the ground that the amount that would be found due would be far in excess of the value of the property and the defendant's assets only consisted of £40, and that they were quite unable to redeem. North, J., ordered the taking of the accounts to be stayed, unless the defendants chose to give security for the plaintiffs' costs of taking them.

LIBEL—INJUNCTION—INJURY TO TRADE—ERRONEOUS STATEMENT OF EFFECT OF A JUDGMENT.

Hayward v. *Hayward*, 34 Chy. D. 198, was an action to restrain the publication of an alleged trade libel. We have seen from the case of *Macdougall* v. *Knight*, 17 Q. B. D. 636, (noted *ante* vol. 22, p. 395), that the publication of a judgment of a Court of Justice by one of the parties interested is not a libel. This case, however, shows that a garbled statement of the effect of a judgment may be a libel, the publication of which the court will restrain by injunction. The plaintiffs and defendants were rival traders in the same kind of business—the names of their respective firms being similar though not identical, and the defendants, in 1885, brought an action to restrain the present plaintiff from representing his firm to be the original firm of R. H. & Sons. At the trial, this part of the action was dismissed with costs, the judge being satisfied that the plaintiff had never made the alleged representations, but that, on two or three occasions, the plaintiff's agent, without his knowledge or concurrence, had done so, and that the plaintiff had repudiated this representation as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never make such a representation. The judge desired that this undertaking should be inserted in the judgment. The plaintiff assented, and it was accordingly inserted.

In 1886 the present defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of the former action, headed by the word "Caution," proceeded: "By the judgment the defendant was ordered to undertake not to represent that his firm is, or that the plaintiff's is not the original firm of R. H. & Sons. Messrs. R. H. & Sons, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the action." North, J. held that this was not a fair statement of the judgment, and that it was a libel injurious to the plaintiff's trade, and that it was not privileged, that the defen-

dants had published it maliciously, and that the plaintiff was entitled to an injunction restraining its further publication with costs. The plaintiff's damages were fixed at £5.

APPOINTMENT OF NEW TRUSTEES—ADDITIONAL TRUSTEE—TRUSTEE ACT, 1850, s. 32.

In *Re Gregson's trusts*, 34 Chy. D. 209, North, J., held that under sec. 32 of the Trustee Act, 1850, the court has jurisdiction to appoint an additional trustee, even though there is no vacancy in the trusteeship.

In *Re Hetherington*, 34 Chy. D. 211, he also held that when under the trusts of a will, different parts of the testator's property were subject to distinct trusts, but in a certain event the trusts would coalesce, that there was power to appoint separate sets of trustees for the different parts of the property.

PAROL CONTRACT BY TESTATOR—CONVERSION.

The only remaining case to be noted is *In re Harrison, Parry* v. *Spencer*, 34 Chy. D. 214, in which it was attempted to apply the doctrine of *Frayne* v. *Taylor*, 33 L. J. Chy. 228. A testator agreed verbally to sell land and received a deposit. The residuary devisee contracted in writing to sell the land to the same purchaser at the same price, to be paid partly by the deposit. The question was whether this was an adoption by the residuary devisee of the contract of his testator so as to effect a conversion of the land into personalty, relating back to the testator's lifetime. North, J. decided that it was not.

REPORTS.

ONTARIO:

ELECTION LAW.

REG. V. STURDY.

Misdemeanour — Demurrer — Unlawful voting at elections an indictable offence—37 Vict. c. 9 (D.)

A person who does an act which a statute on public grounds has prohibited generally is liable to an indictment for misdemeanour; and it is not necessary that the statute should prohibit such act in express language.

The defendant's name appeared on the Voters' List used at the election of a member of the House of Commons, but before such election he lost his right to vote, but voted at the election without having at the time he so voted the qualifications prescribed by law.

Held, that he was guilty of a criminal offence, and was rightly indicted as for a misdemeanour.

[Wilson, C.J.—Huron Assizes, October, 1882.

In this case the defendant was indicted for the offence of "unlawful voting" at an election of a member of the House of Commons of Canada. His name appeared on the list of voters used at the election as tenant of the lot mentioned in the indictment; but before the final revision he gave up his tenancy and removed out of the electoral district, and thereupon lost his qualification to vote. He voted at the election after taking the elector's oath.

The indictment was as follows:—

CANADA. } The Jurors for our Lady the
County of Huron, } Queen, upon their oath, pre-
To Wit. } sent that on the eighteenth day of May, in the year of our Lord, one thousand eight hundred and eighty-two, the Governor-General of Canada, by his writ of election in that behalf issued under the great seal of Canada, duly appointed one Benjamin Wilson, of the town of Wingham, in the county of Huron, to be returning officer for the electoral district of the west riding of the said county of Huron, and therein commanded him, the said Benjamin Wilson, to cause an election to be made, according to law, of a member to serve in the House of Commons of Canada for the said electoral district of the west riding of the county of Huron, and therein further commanded him to cause the nomination of candidates at such election to be held on the thirteenth day of June in the year aforesaid; and, thereupon, in pursuance of such writ of election, the said Benjamin Wilson, being duly qualified as such returning officer, caused the said nomination of

candidates to represent the electors of the said electoral district, as aforesaid, to be duly held on the said thirteenth day of June in the year aforesaid, in the manner and form required by law; and thereupon one Robert Porter and one Malcolm Collin Cameron were duly nominated as the candidates to represent the said electors as aforesaid in the manner and form as required by law; and at such nomination a poll of the duly qualified elector as aforesaid was duly demanded in that behalf, and thereupon the said Benjamin Wilson, as such returning officer, granted the said poll, and fixed the twentieth day of June in the year aforesaid as the polling day for holding the polls at the several polling stations in the several polling districts within the said electoral district of the west riding of the county of Huron in the manner and form required by law, and thereupon the said Benjamin Wilson as such returning officer as aforesaid, by a commission under his hand, duly appointed one James Addison to be the deputy-returning officer for polling district number one, in the town of Goderich, being a polling district within the said electoral district, as aforesaid, there to take the votes of the electors of the said electoral district lawfully qualified to vote at the polling station of the said polling district number one, as aforesaid, according to law, on the twentieth day of June in the year aforesaid. And the said James Addison, being duly qualified as such deputy returning officer, as aforesaid, duly took and received the votes of the electors of the said electoral district at the polling station of the said polling district as aforesaid on the said twentieth day of June in the manner and in the form required by the statute in that behalf.

And the jurors aforesaid, upon their oath aforesaid, do further present that John L. Sturdy, afterwards, to wit, on the said twentieth day of June in the year aforesaid, at the polling station of the said polling district number one, in the said town of Goderich as aforesaid, unlawfully, wilfully, knowingly and deceitfully came before the said James Addison as such deputy returning officer as aforesaid, as a legally qualified elector of the said electoral district of the west riding of the county of Huron as aforesaid, and then and there unlawfully, wilfully, knowingly and deceitfully did vote at the said election as a legally qualified elector as aforesaid, to wit as the tenant of part of lot number one hundred and twenty four in the town of Goderich, in the said electoral district of the west riding of the county of Huron, and as being then at the date last aforesaid, a resident within the said electoral district as aforesaid. Whereas in truth and in fact he said John L. Sturdy, when he so unlawfully, wilfully, knowingly and deceitfully came before the said James Addison as such deputy returning officer as aforesaid, and did vote at the said polling station in the said polling district as aforesaid, on the day and year last aforesaid, was not then in fact or in law the tenant of the said part of lot number one hundred and twenty four in the said town of Goderich, in the said electoral district. And whereas in truth and in fact the said John L. Sturdy, when he so unlawfully, wilfully, knowingly and deceitfully came as aforesaid, and did vote at the said polling station in the said polling district as aforesaid, on the said twentieth day of June, in the year of our Lord, one thousand eight hundred and eighty two, was not then a resident of the said electoral district of the west riding of the county of Huron as required by law. And, whereas in truth and in fact the said John L. Sturdy, at the time of his so voting as aforesaid, was not a qualified elector as aforesaid, and had no lawful right whatever to vote at the said election.

The demurrer was as follows:

And the said John L. Sturdy, in his proper person, cometh into court here, and having heard the said indictment read, saith that the said indictment and the matters therein contained in manner and form as the same, are above stated and set forth are not sufficient in law, and that he, the said John L. Sturdy, is not bound by the law of the land to answer the same, and this he is ready to verify. Wherefore, for want of sufficient indictment in this behalf, the said John L. Sturdy prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

Joinder.

Hodgins, Q.C., for the Crown.

B. L. Doyle, for the defendant, before pleading, asked to be allowed to raise some objections to the indictment.

WILSON, C.J.—I will allow you to demur to the charge in the indictment, with liberty afterwards to plead if necessary.

Doyle.—My ground is that the indictment shows no offence in law. The election statutes of the Dominion create no such offence as is covered by the indictment. The Dominion Elections Act, 1874, does not make unlawful voting an offence; nor does it forbid it. [WILSON, C.J., Does it allow it?] It does not expressly allow it; and there is nothing in the criminal statutes creating such an offence. There is, in the Ontario Elections Act, an express provision prohibiting such voting in Ontario elections. [WILSON, C.J., What is the general rule applicable to statutory enactments in such cases? Is it not that where a statute prohibits a thing, that

it is indictable if the prohibited thing is done? You will find in the case of *Reg.* v. *Buchanan* 8 Q. B. 883, s. c. 10 Jur. 736, the doctrine laid down expressly, that whenever a person does an act which a statute on public grounds has prohibited generally—and it is not necessary to prohibit it in express language—he is liable to an indictment]. There is nothing in the statute prohibiting it; it is only by implication that it can be contended it is prohibited. [WILSON, C.J., If that is the only point, I think I should rule against you, unless you wish to look at the case of *Reg.* v. *Buchanan*].

Hodgins, Q.C., for the Crown, contended that an indictment would lie. The election laws only gave to persons possessing defined qualifications the right to vote at elections; an unqualified person voting was therefore guilty of an unlawful act and a contravention of the statute. And though there was nothing in the election or criminal laws expressly prohibiting snch unlawful voting, the Interpretation Act (31 Vict. c. 1, D.), provided that any wilful contravention of any Dominion Act, which was not made an offence of some other kind, should be construed to be a misdemeanour and punishable accordingly.

WILSON, C.J.—I think the decision in *Reg.* v. *Buchanan*, *supra*, applies; and I shall therefore give judgment for the Crown on the demurrer, and I will allow the defendant to plead over.

Thedefendant thereupon pleaded "Not Guilty"; but after a conviction for perjury in taking the election oath, he subsequently withdrew his plea and pleaded guilty.

The learned judge then sentenced him to pay a fine of $50 on the conviction for perjury; and another fine of $50 on the conviction for unlawful voting; and to be imprisoned in the common jail for three days concurrent, and until the fines were paid.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Nova Scotia.] [Feb. 15.

SOVEREIGN FIRE INSURANCE CO. v. MOIR.

Insurance.

A policy of insurance on the respondent's property contained the following provisions:

"In case the above described premises shall, at any time during the continuance of this insurance, be appropriated, or applied to, or used for the purpose of carrying on, or exercising therein any trade, business, or vocation denominated hazardous or extra-hazardous . . . unless otherwise specially provided for, or hereafter agreed to by this company in writing, or added to or endorsed on this policy, then this policy shall become void."

"Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby unless the change is promptly notified in writing to the company or its local agent."

When the insurance was effected the insured premises were occupied as a spool factory, and it was described as a spool factory in the application. During the continuance of the policy a portion of the building insured was used for the manufacture of excelsior, but the fact of its being so used was not communicated to the company or its local agent. A loss by fire having occurred, the company resisted payment on the ground that the manufacture of excelsior on the premises avoided the policy under the above conditions.

On an action to recover the insurance the plaintiff obtained a verdict, the jury finding, in answer to questions submitted on the trial, that the manufacture of spools was more hazardous than that of excelsior, and that the risk was not increased by adding the manufacture of excelsior in the building. The Supreme Court of Nova Scotia sustained the verdict.

Held, reversing the judgment of the Court below, that as the manufacture of excelsior was, in itself, a hazardous business, the introduction of it into the building insured would avoid the policy under the first of the clauses above set out, even if the jury were right in their finding that it was less hazardous than the manufacture of spools.

Held, also, that the addition of the manufacture of excelsior to that of spools in the said premises was a change material to the risk, and avoided the policy under the second clause above recited.

Henry, Q.C., for appellant.

Borden for respondents.

Nova Scotia.] [Feb. 16.

MARSHALL v. MUNICIPALITY OF SHELBURNE.

Onus probandi.

In an action on a bond against the sureties of the defaulting clerk of the Municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it.

Held (HENRY, J., *hesitante*), that as the plaintiffs had proved a *prima facie* case of a bond properly executed on its face, and had not negatived the due execution of the bond, it being quite consistent with his evidence that it was duly executed, the onus of proving want of execution was not thrown off the defendant, and as neither the subscribing witness nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover.

Borden, for the appellants.

Sedgewick, Q.C., for the respondents.

Nova Scotia.] [Feb. 17.

PICTOU BANK v. HARVEY.

Contract.

On July 14th, 1884, H. forwarded a lot of hides from Halifax, addressed to J. L., Pictou, the bill of lading specifying that they were to be carried to Pictou station. H. had been selling hides to L. for three or four years. An invoice was sent to L. for the price of the hides at the rate previously paid, and L. sent H. a note for the amount which was discounted. The course of dealing between H. and L., was for H. to receive a note for the amount according to his own estimate of weight, etc., and if there was any deficiency to allow L. a rebate on a final settlement.

This lot of his was put off at Pictou landing and remained there until August 5th. On that day L. sent his lighterman to Pictou Landing for some other goods, and he, finding the hides there, took them in his lighter and brought them to L.'s tannery with the other goods. The next day L., on being informed that the hides were at the tannery, had them put in the store of D. L., whom he told to keep them for the parties who sent them, there being at the time, other hides of L. in the said store. The same day, August 6th, L. sent a telegram to H. as follows:—"In trouble. Have stored hides. Appoint some one to take charge of them." H. immediately came to Pictou, and having learned what L. had done, expressed himself as satisfied. He did not take possession of the hides, but left them where they were stored, on L.'s assurance that they were all right.

On August 6th a levy was made under an execution of the Pictou Bank against L. on all L.'s property that the sheriff could find, but these hides were not included in the levy. On August 12th L. gave the bank a bill of sale on all his hides in the store of D. L., and the bank, on indemnifying D. L., took possession of the hides so shipped by H. and stored with D. L. In a suit by H. against the bank and D. L.,

Held (affirming the judgment of the court below), that the contract of sale between L. and H. was rescinded by the action of L. in refusing to take possession of the goods when they arrived at his place of business, and handing them over to D. L. with directions to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of L., whereby the property and possession of the goods became re-vested in H., and there was, consequently, no title to the goods in L. on August 12th, when the bill of sale was made to the bank.

Sedgewick, Q.C., for the appellants.

Borden, for the respondents.

COURT OF APPEAL.

IN RE MACKLEM AND THE COMMISSIONERS OF THE NIAGARA FALLS PARK.

Construction of will—Forfeiture—Vis major—Expropriation.

T. C. S. devised his estate of Clark Hill with the islands, lands and grounds appertaining. M.'s grandmother, by her will, directed her executors to pay him $2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate and beautify the property known as Clark Hill and the islands connected therewith."

Held, that the expropriation, under an Act of the Legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated the arbitrators properly excluded the consideration of a contemplated loss by M. of this annuity.

A failure by M. to reside and occupy would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default: the *vis major* of a binding statute could not work a forfeiture.

Upon the evidence the court refused to interfere with the amount of compensation awarded.

Irving, Q.C., for the Park Commissioners.
Robinson, Q.C., and *Street*, Q.C., contra.

CHANCERY DIVISION.

Boyd, C.] [Nov. 4, 1886.

DAWSON v. MOFFATT ET AL.

C. S. U. C. c. 73—Marriage settlement—Wife's after acquired personal property.

It is evident from the scope of C. S. U. C. c. 73, that notwithstanding any marriage settlement, any separate personal property of any married woman acquired after marriage, and not coming under or being affected by such settlement, shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without a settlement.

W. Nesbitt, and *F. C. Moffat*, for the wife.
C. L. Ferguson, for husband's creditors.

Ferguson, J.] [January 8.

HYMAN. v. HOWELL.

Assignment for creditors—Costs of attacking a fraudulent preference—Making good to the estate moneys spent on useless legal proceedings.

W., on March 7th, 1884, assigned all his estate by deed to B., himself a creditor of W., on trust for the creditors of W.

On March 18, 1884, at a meeting of creditors held by B., it was resolved with B.'s consent that M., an execution creditor of W., should bring an action on behalf of all the creditors of W., to contest the validity of a certain chattel mortgage made to H. & Co. by W., prior to the above assignment to B. M. accordingly brought the action, the costs of which the creditors agreed should be borne by the estate. H. & Co. were not present at the meeting. The action was dismissed with costs, and B. paid the defendants H. & Co.'s costs of that action, and also the costs of the solicitor who acted for M., out of the moneys of the estate, $462 in all.

H. & Co., being large creditors of W., now brought this action, asking that the executors of M. should pay the $462 to B. to be distributed among the creditors of W.

There was no evidence of M. or his executors having requested B. to pay the $462 of costs.

Held, that as to the $300 costs paid to M.'s solicitor, no request on M.'s part to B. to pay this to the solicitor could be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, because it was thought the action could not succeed with B. as plaintiff, and M. was not liable to the said solicitor as to those costs, and therefore the plaintiffs failed as to their sum.

Held, also, that the plaintiffs could not succeed as to the balance, $162, for there could be no reasonable doubt that they knew these

moneys, which were paid to them by B. as their costs of defence, were moneys of the estate of which B. was trustee, and must be held to have assented to its being so paid. See *Dillon* v. *Raleigh*, 13 A. R. 53, at pp. 67, 68.

Gibbons, for the plaintiffs.

Lash, Q.C., for the executors of M.

Barber, for the defendant B.

Proudfoot, J.] [January 8.

HATTON v. BERTRAM.

Will—Construction—Passing of afterward acquired property—Devise of estate by name—Subsequent additions—Completion of building commenced by testator.

J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal and mixed, upon trust to hold "that part of my property known as Walkerfield, being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them as hereinafter provided for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed, with regard to the sum of $40,000 hereinafter directed to be set out." He then directed his trustees to set apart the sum of $40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of $1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces, and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands (Walkerfield, if sold in my daughter's lifetime, to be sold with her consent only), at such time or times, and in such manner as to them may seem best."

The will was made on September 10th, 1879; and J. C. died December 18th, 1885. After making the will, on June 27th, 1883, J. C. purchased five acres, and on September 21st, 1883, another five acres, forming a block of ten acres of which one corner nearly coincided with one extremity of a diagonal of "Walkerfield." On November 22nd, 1884, he sold a piece of about three and one-third acres of Walkerfield.

In his lifetime, J. C. entered into a contract in writing for the erection of a dwelling house on "Walkerfield" which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect to it.

Held, (1) that the daughter was tenant for life of Walkerfield, and after her death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children the residuary legatees took: (2) that the ten acres subsequently purchased passed under the devise of "Walkerfield," the evidence clearly showing that he bought it to form part of Walkerfield: (3) that the funds to build the house must come out of the residue.

Moss, Q.C., for the plaintiff.

Lash, Q.C., for the adult defendants.

Maclennan, Q.C., for the infant defendants.

Proudfoot, J.] [January 8.

BAIN v. MALCOLM ET AL.

Will—Agreement giving effect to unexecuted will—Deficient estate—Retainer—Set-off.

J. R. endorsed notes for the accommodation of J. R. The holders received out of the estate of J. R. after his death 60 cents in the dollar, leaving $3,500 unpaid. B., the executor of J. R., paid this. J. R., who died January 1st, 1884, left all the residue of her estate, real and personal, to be equally divided, share and share alike, between J. R., J. F., and J. B. Shortly before her death, J. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R.

On January 4th, 1884, all persons interested in the residuary devises in these two wills, signed a written agreement on the back of the intended will, that they accepted the distribution of the estate of J. R. provided for in the latter unexecuted will.

By his own will, executed on February 13th, 1884, J. R. directed that the estate of J. R.,

"so far as I am interested therein," be divided according to the said agreement signed by him on January 4th, 1884.

Held, (1) B., the executor of J. R., had a right to retain out of the residuary share of her estate assigned by the will of J. R., the full balance due on the said accommodation notes, although J. R.'s estate was insolvent.

R. S. O. c. 107, s. 30, abolishing the right of retainer in case of a deficiency of assets, does not affect the question.

(2) The agreement of January 4th, 1884, was binding on J. R., and was binding on his executor, and could not be impeached by his creditors.

Bruce, Q.C., for the plaintiff.

Kittson, for the defendant.

Galt, J.] [January 12.

THOROLD MANUFACTURING CO. v. IMPERIAL BANK.

Banks and banking—Action to recover amount of cheque—Endorsation—Company.

Action to recover the amount of a cheque made payable to the order of the plaintiffs, and alleged to have been paid by the defendants without the proper endorsation of the plaintiffs.

The by-laws of the plaintiffs' company provided that all moneys should be received by the treasurer, and deposited by him to the credit of the company, and drawn out on cheques made by the secretary, and countersigned by the treasurer.

It appeared that the property of the company belonged almost entirely to R. B. M. who was president and treasurer, and whose son R. D. M. was secretary.

On the occasion when the cheque was given, R. D. M. had gone to the makers of the cheque to receive the money for certain goods supplied to them by the plaintiffs, and had received the cheque, which he endorsed in the name of the plaintiffs, signing his name as secretary.

It appeared that on several previous occasions he had done the same thing with cheques drawn on the defendants, and who, therefore, had no reason to believe that he was exceeding his authority, and it also appeared that he had acted as general agent of the plaintiffs' company.

Held, that the plaintiffs could not recover, and the action must be dismissed.

Osler, Q.C., for plaintiffs.

Cox, for defendants.

PRACTICE.

Ferguson, J.] [February 10.

RE CHRISTIE, CHRISTIE v. CHRISTIE.

Appeal—Forum—Divisions of High Court—Sec. 25, O. J. A.

Held, that the setting down in the Common Pleas Division of an appeal from a master's report in an action in the Chancery Division, was, having regard to sec. 25, O. J. A., a nullity, and could not avail the appellants to make their appeal in time. *Laidlaw* v. *Miller*, 11 P.R. 335, not followed.

P. McPhillips, for the appellants.

E. Douglas Armour, for the respondent.

Proudfoot, J.] [Jan. 10.
Chy. Div'l Ct.] [February 23.

POWELL v. PECK, ET AL.

Leave to appeal—Discretion—49 Vict. ch. 16 sec. 39 (O.).

Leave was given to appeal from the decision of Proudfoot, J., 12 O. R. 492, as to the rate of interest after maturity in mortgage cases, because of the importance of the question involved and of conflicting decisions. An appeal now lies to the Divisional Court from a discretionary order, by virtue of 49 Vict. ch. 16 sec. 39 (O.), but that enactment has not altered the rule that a very strong case must be made out to induce the court to reverse such an order.

Beck, for the defendants.

E. T. English, for the plaintiff.

Boyd, C.] [February 14.

COMSTOCK v. HARRIS.

Discovery—Examination of party resident out of jurisdiction—Appointment and subpœna—Conduct money—Convenience—Production of books—Staying action.

When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpœna, as in the case of resident litigants, is sufficient to compel his attendance; and it lies upon the party so served to object at the time to the payment made for conduct money.

It is not reasonable that books in constant use in business should be brought into the jurisdiction from a foreign country for the purposes of an examination, unless the examiner in the course of the examination rules that they are necessary.

Upon failure of the plaintiff to attend for examination, pursuant to subpœna and appointment served upon him, the action should not be stayed till he does attend; it is sufficient to impose a stay for a definite time.

Langton, for the plaintiff.

Holman, for the defendant.

Mr. Dalton, Q. C.] [February 15.

DOMINION S. & I. CO. v. KILROY.

Interpleader—Order to produce—Locality—Motion for irregularity, grounds of.

After delivery of an interpleader issue a party may take out on *præcipe* an order for production of documents by the opposite party.

Such order should issue, and the record should be passed in the principal office of the court in Toronto, as no locality is pointed out by the proceedings in interpleader. A notice of motion to set aside a proceeding for irregularity should show, or refer to affidavits showing, what the irregularity is; and where a notice was deficient in this respect, the motion was dismissed, but without costs, as the objection advanced on the return of the motion was well taken.

J. R. Roaf, for the plaintiffs.

Aylesworth, for the defendant.

Boyd, C.] [February 16.

ADAMSON v. ADAMSON.

Writ of assistance—R.S.O. c. 66, s. 11.

The application of R.S.O. c. 66 is not limited to purely common law actions pending in those courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance, in execution of a decree of the Court of Chancery for the recovery of land, is a writ of execution within the meaning of s. 11 of that Act, and does not remain in force after one year from the teste, if unexecuted, unless renewed,

Maclennan, Q.C., for the plaintiff.

Bain, Q.C., for the Sheriff of Peel.

Chan. Div.] [February 21.

RE RAINY LAKE LUMBER CO.

Appeal—Divisional Court—Winding-up proceeding—45 Vict. ch. 23 s. 78.

Pending proceedings under an order for the winding-up of a company under 45 Vict. ch. 23, (D.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a judge in court, and was adjourned by him for the sake of convenience before the judge holding the Port Arthur Assizes, who heard the evidence orally and pronounced judgment thereon.

Held, that the proceeding at Port Arthur was not the trial of an action, and therefore, and also having regard to the provisions of 45 Vict. ch. 23 s. 78, that no appeal lay to the Divisional Court.

George Bell, for the Union Bank.

J. R. Roaf, for the liquidator.

C. P. Div.] [February 21.

HUNTINGTON v. ATTRILL.

Action on foreign judgment—Staying proceedings—Appeal in foreign country.

An action on a foreign judgment was stayed, pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed

by the foreign court. Terms as to diligence in prosecuting the appeal, and preservation of the defendant's property in Ontario in *statu quo* were annexed to the order.

Kingsmill, and *H. Symons*, for the plaintiff.

Robinson, Q.C., and *Aylesworth*, for the defendant.

Mr. Dalton, Q.C.] [February 21.

IRVING v. CLARK.

Costs, security for—Order against one of two plaintiffs.

The rule that security for costs should not be ordered, where it could only be against one of two or more plaintiffs, does not now universally govern, since the law as to the joinder of plaintiffs has been changed by Rule 89, O. J. A.

Quære, whether the rule was ever applicable to the ordering of security for costs against a plaintiff who is insolvent, and not having any beneficial interest, is put forward by another person.

And where one plaintiff was suing to enforce a mechanic's lien, and the other to set aside a sale of the same property, security for costs was ordered against one alone.

S. R. Clark, and *R. A. Dickson*, for the defendants.

Dewart, for the plaintiffs.

CORRESPONDENCE.

MOTIONS FOR NEW TRIALS.

To the Editor of the CANADA LAW JOURNAL:

I observe an article in your issue of the 1st of January in reference to motions for new trials, and pointing out the difference in the practice of the different divisions of the Supreme Court of Judicature for this Province.

Why should there be any difference as regards the effect of a finding by a jury, and the subsequent entry of judgment by the court from the case where the court itself finds the fact and enters the judgment, so far as the subsequent rights of the litigants are concerned? In jury cases, unless a certificate be obtained from the presiding judge, for immediate execution, the entry of judgment is postponed until the following term, while in non-jury cases judgment may be entered at once by the successful litigant, unless the entry of judgment be stayed by the presiding judge until the following term. The practice should be uniform.

The judge would in all cases stay the entry of judgment upon proper terms until term.

If the suggestion I throw out were adopted, there would be no necessity for orders *nisi* for new trials, and an application for either a new trial, or for a judgment in terms different from that entered by the judge at the trial, would then in all cases be by notice of motion. May I also point out that the practice of holding in the country different sittings for the Common Law and Chancery Divisions should at once cease? The whole trouble arose from the timidity of Attorney-General Mowat in framing the Judicature Act, and the somewhat unreasonable timidity of the judges in adopting the changes introduced by that Act. There is no reason in the world why the Chancery Division should not be what it professes to be—a Division of the High Court—and not, as it in reality now is, a separate court. I think the time has arrived when the judge who takes the Hall work should take everything that ordinarily comes before a single judge. He would, perhaps, be hard worked, but the entire work is within the compass of an industrious judge, devoting five days of the week at least to that purpose.

Yours,

LEX.

LIMITATION OF ACTIONS.

To the Editor of the LAW JOURNAL:

The point raised by Mr. Langton in your issue of February 1st has occurred no doubt to most of the profession, and I avail myself of your invitation to convey to your readers the view I have formed upon the subject.

It is somewhat strange that the point has not been raised before in the courts of this Province. *Allan* v. *McTavish*, 2 App. Rep. 278, is certainly inconsistent with *Sutton* v. *Sutton*, 22 Ch. Div. 511, and *Fearnside* v. *Flint*, 22 Ch. Div. 579, and I think that the judgment of Moss, C.J., in the first of above cases is inconsistent with his reasoning in the case of *Boyce* v. *O'Loane*, 3 App. Rep. 167, as I shall hereafter point out.

Our first duty is to look at the exact words of the statute which limits the recovery of certain claims to a period of ten years after the right accrues. Section 23, cap. 108 R. S. O., is as follows:

CORRESPONDENCE.

"No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within ten (twelve) years next after a present right to receive the same has (shall have) accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has (shall have) been paid, or some acknowledgment of the right thereto has (shall have) been given in writing, signed by the person by whom the same is (shall be) payable, or his agent, to the person entitled thereto or his agent; and in such case no action or suit or proceeding shall be brought, but within ten years after such payment or acknowledgment or the last of such payments or acknowledgments if more than one was made or given."

And if we insert in this section the words that I have enclosed in brackets, substituting twelve for ten years, and eliminating the obvious words from our Act, we have the corresponding section in the Imperial Act, the two sections being practically identical, with the exception that the period of limitation in England is twelve years. The only difficulty that arises in the construction of this statute is in reference to the word "judgment," and as Chief Justice Moss points out in *Boyce* v. *O'Loane*, it is a probable conjecture that the word was introduced *per incuriam* by the draftsman of the Act not appreciating the different effect that a judgment may have in relation to the lands of a debtor in England and in this province. In England a judgment becomes a lien upon the lands of a debtor by a procedure called docketing, which binds the lands of a judgment debtor throughout England, no matter where situate, and by means of a writ of elegit the judgment creditor may have delivered to him the lands of the judgment debtor to enable him to obtain satisfaction of his judgment. It will be observed, therefore, that the moment a judgment in England is docketed, it becomes from that moment a charge upon the debtor's lands, and by virtue of section 58, cap. 57, 37 and 38 Vict. (Imperial Act) such judgment becomes effete at the expiration of twelve years. There is nothing rendering it obligatory upon the judgment creditor to docket the judgment, and this peculiar attribute only attaches to the judgment from the moment of docketing. I should surmise that proceedings can, in England, be taken to realize a judgment from the debtor's lands the moment it is docketed, and therefore r that moment the judgment creditor has a present right to receive such judgment within the meaning of the section I refer to.

Some effect, however, must be given to the word "judgment" in the section in question in the Act in force in this province. I may here point out that Moss, C.J., thinks it clear that the word "judgment" in our Act (and thus far agreeing with English decisions) refers to judgments having the quality of binding lands. A judgment in this province becoming a charge upon lands by the aid of a *fi. fa.* placed in the hands of the sheriff in the county in which the lands of the debtor lie or are supposed to lie, and from the moment that the writ of *fi. fa.* lands is received by such sheriff, the debtor's lands are in such county bound by the judgment, but it is not necessary for the judgment creditors to issue and place in a sheriff's hands such writ of *fi. fa.* lands, and where the debtor has no lands of course he will not do so. May not the proper interpretation of this section of the Act be that in regard to judgments which by the judgment creditor have been so made a charge upon the debtor's lands the statute affects such judgments, and at the end of ten years from the time the creditor has a present right to receive the fruit of his judgment it will be deemed to be satisfied, and that period of course will be twelve months from the period the writ reaches the hands of the sheriff, at which latter period a sale of the debtor's lands may be had? If my view of the statute be correct, then every difficulty is seemingly removed as regards the interpretatton of this section. If the judgment creditor does not see fit to cause his judgment to become a charge upon the debtor's lands, he will still have twenty years in which to bring an action upon his judgment, and so full effect can be given to section 1, sub-section (b) cap. 61 R. S. O., enacting that an action may be brought upon a debt, bond or other speciality within twenty years after the cause of such action arose. And this explanation removes the difficulty suggested by Mr. Langton in reference to proceedings to enforce a judgment upon which writs of execution have been issued after the judgment is more than fifteen years old (see section 330, cap. 50 R. S. O.).

If we now take up the English decisions bearing upon this point, we will find them all consistent. The first case in which a similar question was discussed was the case of *Hunter* v. *Nockolds*, 1 Mac. G. 640, in which Lord Chancellor Cottingham decided that when the Legislature enacted that only six years' arrears of rent could be collected this period was not extended, although the creditor held the personal covenant of the debtor, and notwithstanding the fact that under ordinary circum-

stances an action could be brought upon a covenant until the lapse of twenty years.

In *Sutton* v. *Sutton*, 22 Ch. Div. 511, the Court of Appeal in England held that when a mortgage became extinguished after the lapse of twelve years from the time it became payable the personal covenant of the mortgagor contained therein was also extinguished with the debt, though in the case of an action brought upon the ordinary covenant of the debtor the creditor would have the full period in which to bring his action. *Fearnside* v. *Flint*, 22 Ch. Div. 579, merely states the law to be that it makes no difference whether the covenant in aid of the mortgage debt is contained in the same instrument or in a separate instrument, and that the same result follows. From these decisions we may infer that while in ordinary cases an action may be brought upon a covenant within twenty years from the maturity of the debt, yet when the covenant is in aid of a charge upon lands it ceases to have validity the moment the right to enforce the charge ceases to exist. If this view of the law be correct, no doubt *Allan* v. *McTavish* was not well decided. Strange to say, Chief Justice Moss in the latter case refers to *Hunter* v. *Nockolds*, and, I think, fails to appreciate the effect of the decision, and seems to have supposed that this latter case decides that an action may be brought upon the covenant in aid of a rent charge, after the charge was deemed to be satisfied by the statute in question, although the case decided directly the contrary. However *Boyce* v. *O'Loane* is well decided, as there is nothing in the case to indicate that the judgment there referred to had ever been made to charge upon lands by means of a *fi. fa.*, and Moss, C.J., expressly says on page 173: "Having regard to the ordinary meaning of the language, and to the opinions I have quoted, the conclusion would seem to be that if there were no judgments operating as charges upon lands the section did not affect judgments at all—in other words, that there was no subject-matter to which that part of the section was applicable, and that no period of limitation was prescribed for judgments not forming a charge upon lands."

It is not amiss to point out that at one time judgments in this province were by means of certificates given by the officer who entered the judgment and the registration of such certificates available against the lands of the debtor without the aid of a writ of *fi. fa.* lands. See section 275, cap. 22 Con. Statutes of U. C.

W. H. MCCLIVE.

FLOTSAM AND JETSAM.

INTERRUPTIONS OF COUNSEL.—The Irish bull is sometimes introduced into this country with the most gratifying effect. Baron Dowse, of the Irish Exchequer, let loose some famous specimens when he sat in the House of Commons. Replying to a question relating to some sectarian celebration in Derry, he is reported to have said: "These celebrations, sir, take place at an anniversary, which occurs twice a year in Derry." The other evening we encountered an equally well-developed example of the bull. A member of the English Bar, an Irishman, well known in society for his many amiable qualities, was discussing a current topic with considerable animation. He was occasionally interrupted by one of the company, and at length became irritated, he addressed his friend with much dignity, and said: "You can interrupt me, surr, when I'm done spaking."—*Pump Court.*

LITTELL'S LIVING AGE. The numbers of the *Living Age* for February 5th and 12th contain, "China," by the Marquis Tseng, *Asiatic;* "Jubilee Reigns in England," *National;* "The Zenith of Conservatism," by Matthew Arnold, and "Rural Life in Russia," *Nineteenth Century;* "Benvenuto Cellini's Character," by J. Addington Symonds, and "The Present Position of European Politics," *Fortnightly;* "The Land of Darkness," *Blackwood;* "The Seventh Earl of Shaftesbury; Incidents in his Life and Labours," *Leisure Hour;* "Some Recollections of Charles Stuart Calverley," *Temple Bar;* "French Finance," "Pio Nono's Will," "Lord Iddesleigh," and "The Progress of Savage Races," *Spectator;* "An Ancestor of the Czar," and "Farm Life in the North a Century Ago," *St. James' Gazette;* "Some Narrow Escapes," *All the Year Round;* "Ipecacuanha Cultivation in India," *Nature;* "The Excavation of the Great Sphinx," *Times;* "On a Jury," *Globe;* with instalments of "The Strange Story of Margaret Beauchamp" and "Richard Cable, the Lightshipman," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston are the publishers

Law Society of Upper Canada.

OSGOODE HALL.

MICHAELMAS TERM, 1886.

The following gentlemen were called to the Bar, viz.:

November 15th.—Robert Stanly Hays, Wellington Bartley Willoughby, Frederick Stone, Trevussa Herbert Dyre, Franklin Montgomery Gray, Edward Arthur Lancaster, Lorenzo Clarke Raymond, Delos Rogest Davis, John Michael Macnamara, Henry Clay, Eudo Saunders, Archibald McAlpine Taylor, Alexander Fraser.

November 16th.—William James Tremeear, John Robertson Millar, David Alexander Givens, George Francis Burton, Henry Smith Osler, Walter Stephens Herrington, Duncan Ontario Cameron, Osric Leander Lewis, Francis McPhillips, Frederick George McIntosh, Archibald McKechnie, Edward Ellis Wade.

November 20th.—Donald Calvin Hossack.

December 4th.—Herbert Henry Bolton.

The following gentlemen were granted Certificates of Fitness, viz.:

November 15th.—A. M. Denovan, A. M. Taylor, O. L. Lewis, W. B. Willoughby, F. Stone, W. S. Herrington, R. Vanstone, R. F. Sutherland, A. Fraser, S. McKeown, C. B. Jackson, D. H. Cole, R. H. Pringle, A. B. Cameron, E. W. Boyd, F. E. Titus.

November 16th.—A. W. Wilkin, F. M. Gray, G. F. Burton, W. J. Tremeear, D. B. S. Crothers, H. G. Tucker, J. J. Smith.

November 20th.—H. Morrison, H. W. Bucke, F. G. McIntosh, N. J. Clarke, J. R. Shaw.

December 4th.—H. J. Dawson.

The following gentlemen passed the First Intermediate Examination, viz.:

M. H. Ludwig, with honors and first scholarship; J. M. Palmer, with honors and second scholarship; E. H. Britton, with honors and third scholarship; S. A. Henderson, with honors; and Messrs. J. H. Hunter, S. D. Lazier. R. G. Smyth, H. H. Johnston, J. T. McCullough, A. Collins, E. E. A. DuVernet, H. Harvey, J. Irving Poole, G. C. Gunn, W. A. Skeans, R. L. Elliott, R. M. Macdonald, W. Pinkerton, G. D. Heyd, O. Ritchie, W. L. B. Lister, M. C. Bigger, R. L. Gosnell, H. E. McKee, R. O. McCulloch, F. J. Travers, H. F. Errett, M. F. Muir.

The following gentlemen passed the Second Intermediate Examination, viz.:

F. A. Anglin, with honors and first scholarship; W. S. Hall, with honors and second scholarship; J. T. Kirkland, with honors and third scholarship; N. F. Davidson and A. Morphy, with honors; and Messrs. T. Scullard, H. S. W. Livingston, F. P. Henry, R. R. Hall, A. Saunders, F. A. Drake, H. R. Welton, J. M. Quinn, J. Y. Murdoch, A. F. May, W. L. M. Lindsay, D. R. Anderson, T. Browne, R. J. Maclennan, H. B. Smith, W. S. Turnbull, R. K. Orr, T. A. Wardell, H. N. Roberts, A. E. Trow, A. C. Camp, H. M. Cleland, W. W. Jones.

The following gentlemen were admitted into the Society as Students-at-Law:

Graduates.—Bidwell Nicholls Davis, Robert Elliott Fair, Lennox Irving, Ralph Johnston Duff, Donald Roderick McLean, James Wilson Morrice.

Matriculants.—Frederick Billings, George Davidson Grant, William Alexander Baird, Henry John Deacon Cooke, Christopher Lucy, Louis Vincent McBrady, John Flemington Tannahill, Robert Talbot Harding, Alexander Robertson Walker, William Henry Williams.

Junior Class.—C. P. Blair, C. F. Maxwell, W. F. Langworthy, J. A. Harvey, G. B. Wilkinson, J. McBride, H. C. McLean, F. R. Blewett, J. B. Pattullo.

Articled Clerks.—T. H. Lloyd, J. Lennox, H. W. Maw.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to mark obtained at examinations.

20. An Intermediate Certificate is not taken i lieu of Primary Examination.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

LAW SOCIETY OF UPPER CANADA.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of ervice mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. MARCH 15, 1887. No. 6.

DIARY FOR MARCH.

17. Thur.....St. Patrick's Day.
18. Fri.....Arch. McLean, 8th C. J. of Q. B., 1862.
19. Sat.....P. M. Vankoughnet, 2nd Chancellor, 1862.
20. Sun.....*4th Sunday in Lent.* Lord Mansfield died, 1773. æt. 89.
27. Sun..... *5th Sunday in Lent.*
28. Mon .....Lord Romilly app. M. R., 1851.
30. Wed.....B. N. A. Act assented to 1867. Reformation in England began, 1534.

TORONTO, MARCH 15, 1887.

OUR correspondent in "Our English Letter" makes some sensible remarks on the treatment of counsel by the Bench. What a pleasant thing it must be to argue cases before the House of Lords. Judicial experience is a good thing and this journal has recognized it before now; but we see no reason why it should go hand in hand with that irrelevant talk and distracting and irritating interruption which so often wastes the time of the public at Osgoode Hall. We refer especially to that class of questions and remarks which would not be made if the Judge had patience to listen attentively to the whole argument of counsel without interrupting them. We cannot, on this subject, improve on the remarks of our correspondent, to which we refer the reader.

THE world moves, and modern improvements meet us at every turn. Not the least important time-saving machine (if we may so call him), which we meet with nowadays, is the ubiquitous stenographer, and his attendant satellite, the type writer. He has turned up, however, we must confess, in a somewhat unexpected quarter. In a recent case he was summoned to a certain learned judge's private room, and into his listening ear was poured for half an hour or more, the strains of judicial eloquence, which being duly indited in the hieroglyphics peculiar to the craft, a notification was made to the solicitors for the parties that judgment had been delivered.

Thus, in an easy and expeditious manner, the judicial soul unburthened itself of reasons—but here comes the rub. The suitors, naturally enough, were curious to know the reasons which had been given for the judgment, but on application to the depository of judicial wisdom, that functionary failed to see any obligation on his part to make a transcript of his notes, except at so much per folio. This method of delivering judgment, while it has its advantages, so far as the judicial and reportorial side of the question is concerned, may possibly be viewed with different feelings by those who were wont to enjoy gratis a treat for which they must now, perforce, either dance attendance on the reporter or shell out hard cash. We presume a judge is not bound to give reasons for his decisions. But if he does, it is generally understood that he should give them in open court. It is possible that in the particular case referred to there may have been some reason for this mode of procedure. We have heard, however, that this is not an isolated case, and for fear of its becoming a common practice we have thought proper to refer to it.

AT the recent sitting of the Divisional Court a case came before the court in which the facts were very similar to those in *McDonald* v. *McDonald*, 44 U. C. Q. B. 291, and counsel cited that case and relied on it as an authority, and the Court felt itself very much pressed by that decision, and would probably have given judgment in accordance with it, had not Mr. Moss, Q.C., who happened to be on the other side, been able to satisfy the Court by reference to the books of the Registrar of the Court of Appeal, that the case had been reversed by the latter Court. In giving judgment the learned Chancellor drew attention to the inconvenience which may result from the decisions of the Court of Appeal not being reported when they reverse or vary the reported decisions of the inferior tribunals. We think that it ought to be an inflexible rule with the reporters of the Appellate Courts to report every decision of those Courts which reverses or materially varies the reported decision of any inferior court. It is sometimes concluded, because a decision is delivered orally, that therefore it is unimportant, and not worth reporting, but whenever the decision materially affects a previously reported case, there can be no doubt that it ought to be reported. It is here that the intelligence and industry of the reporter find a field for their exercise. It is but fair to add that the responsibility for the omission to report *McDonald* v. *McDonald* in Appeal does not rest with the present learned reporter of that Court.

OUR ENGLISH LETTER.

To an era of sensational trials has succeeded one of peaceful and energetic work. At the present moment there is not, so far as your correspondent is aware, a single case, either in progress or in prospect, which is of such a character as to fascinate the public mind. Nor has there been such a case during the present sittings of the courts, unless *Allcard* v. *Skinner* can be brought within the category; but if the truth must be told, that case was watched chiefly with the view of ascertaining the judicial capacities of Mr. Justice Kekewich. It had been said, in no measured language, that the appointment partook of the nature of a "job," and, of a truth, there seemed to be no particular reason for the choice of the Lord Chancellor. Now, however, it appears to be generally admitted that whether or no, strong reasons existed for the elevation of Mr. Justice Kekewich, the Lord Chancellor made a good selection, and added to the list of Equity Judges a man thoroughly capable of doing his duty in a satisfactory manner. The rumours of judicial changes hinted at in my last communication turn out to be, as I anticipated, without foundation. Justices Grove, Field and Denman still sit upon the bench, and are likely to sit there as long as any of their brethren for all that is known to the contrary. In fact, there is but a single new appointment to chronicle; that is to say, Mr. Macnaghten, Q.C., has become Lord Macnaghten, and now sits in judgment upon the propositions of law laid down by the very men before whom he lately practised. It is somewhat early to attempt a criticism upon the appointment; but there can be little doubt concerning the ability and the learning of the appointee, a man who is said to have declined more than once the honour of an ordinary judgeship.

The mention of this appointment brings

OUR ENGLISH LETTER.

me to the verge of a suggestive subject. In the House of Lords there are now engaged in hearing appeals from the Court of Appeal the Lord Chancellor, Lord Herschel and Lord Macnaghten. Between them they possess every variety of experience in forensic practice; yet it may be said, with substantial truth, that none of them are possessed of judicial experience. Nevertheless it would be difficult to find in the world, and impossible to discover in this country, a court of equal competence and courtesy. The judges never interrupt; they give even junior counsel credit for the possession of common sense; they are careful not to disturb the thread of an advocate's argument. The moral appears to be that it is better to be before a man fresh from experience at the bar than to be subjected to the tender mercies of a judge who has forgotten the difficulties of argument. Certain it is that both upon the common law side and upon the equity side there are judges, and plenty of them, to whom an occasional visit to the House of Lords would teach an invaluable lesson in the treatment of counsel. The beauty of the thing is that in the House of Lords there is no waste of time. An advocate lays the whole of his argument before the court in the shape upon which he has deliberately fixed his choice. Secure against irrelevant questions from the Bench, he is never distracted by the discussion of side issues; equally secure against interruptions by his opponent, he is encouraged to state his case with almost judicial precision and completeness, for the Lords will not by any means permit one counsel to interrupt another, and they apply this rule with equal strictness, even when the most eminent of Queen's Counsel is opposed to the most insignificant of juniors.

Profesional topics are scarce just now. Common law judges are for the most part absent upon the circuits which are just drawing to a close, and the circuits are, as usual, the subject of complaint. This time the criticism has taken a new form, the result of which will be, in the immediate future, a fresh reorganization of the circuit system. It has been discovered that the practice of sending single judges round a circuit is inconvenient to everybody, and particularly wasteful as far as the time of the Bar is concerned; it has been discovered also that grouped assizes are more than unpopular in the provinces. What the outcome may be is more than it would be safe to predict. The chances are rather in favour of the old system which, after working fairly well for a great number of years, was altered in unnecessarily precipitate deference to a cry which had no substantial foundation. London suitors, in a frame of mind easily to be understood in the case of the inhabitants of a great capital, assumed that they were entitled to greater facilities than their brethren in the provinces. Hence came an alteration intended to give the advantage to the London suitor. The intention was not realized, for less time still elapses in the country than in London between the writ and the judgment, but in the meanwhile several counties were placed at great inconvenience and expense, especially in relation to the transport of prisoners. The whole truth of the matter is that the staff of judges is inadequate, and that there is no justification for the inadequacy. The law already pays its own expenses, but the delays of the law deter many suitors from seeking redress. More judges would mean increased litigation at greater speed. It used to be said that the object of the legislature ought to be the discouragement of litigation; but before "litigation" we must read "frivolous and unnecessary." It was never the aim of any wise lawgiver to make the machinery of justice so slow that men should be deterred from insisting on their rights.

Temple, Feb. 13.

LAW SOCIETY.

MICHAELMAS TERM, 1886.

The following is a résumé of the proceedings of Convocation on the 28th and 30th December, 1886, and of Hilary Term, 1887.

TUESDAY, 28TH DECEMBER, 1886.

Convocation met.

Present—Messrs. Irving, Maclennan and Murray.

There being no quorum at eleven o'clock in the forenoon of the said day, being thirty minutes after the hour of meeting, the senior barrister present adjourned the meeting of Convocation to half-past ten o'clock in the forenoon of Thursday next, the 30th December instant.

THURSDAY, 30TH DECEMBER, 1886.

Convocation met.

Present—The Treasurer, and Messrs. Cameron, Falconbridge, Ferguson, Foy, Guthrie, Irving, Kerr, Lash, Maclennan, McMichael, Martin, Morris, Moss, Murray and Smith.

The minutes of last meeting were read and approved.

Mr. Murray, from the Committee on Finance, laid on the table the agreement between the Society and the caretaker, A. Gilly, proposed by the Finance Committee.

Ordered, That the Committee be authorized to complete the agreement.

Mr. Irving, from the Library Committee on the reference of the petition of students as to the increase of books for students' use, moved that they be authorized to purchase certain additional copies, viz.:

4 copies Best on Evidence.
4 " Byles on Bills.
3 " Benjamin on Sales.
2 " Dart on Vendors and Purchasers.
2 " Harris on Criminal Law.
2 " Leith's Williams' on Real Property.
2 " O'Sullivan's Government in Canada.
2 " Pollock on Contract.
4 " Smith's Common Law.
2 copies Smith's Equity Jurisprudence.
4 " Smith's Mercantile Law.
2 " Taylor's Equity.—Carried.

The petition of T. Hislop was read.

Ordered, That the prayer be not granted.

The petition of A. A. McTavish was read.

Ordered, That the prayer be not granted.

Mr. Moss gave notice that on the first day of next Term he will introduce a rule to regulate the fees to be paid by Articled Clerks who, having passed the Primary examination therefor, afterwards desire to pass the primary examination for, and be entered as Students-at-Law.

Ordered, That the draft of the Consolidated Rules as settled at the last meeting of Convocation, be submitted by the chairman of the Committee on Journals and Printing, to the visitors for their approval in so far as required by law.

Convocation adjourned.

HILARY TERM, 1887.

The following gentlemen were called to the Bar during Hilary Term, 1887, viz:—

February 7.—Allan Macnab Denovan, John Samuel Campbell, Richard Henry John Pennefather, Alexander William Marquis, Patrick Macindoe Bankier, William Thomas McMullen, William Highfield Robinson, Edward Wilson Boyd, John Ross.

February 8.—Alexander Lillie Smith, Thomas Francis Lyall, George Cooper Campbell, Stephen Alfred Jones, Robert Urquhart McPherson, James Moir Duncan, George Wheelock Burbidge (special case).

February 12.—John James Smith, James Hampden Burnham.

February 18.—Oscar Ernest Fleming (special case), Frank Norman Raines.

The following gentlemen were granted certificates of fitness, viz.:—

February 7.—D. O. Cameron, W. K. Cameron, J. M. Rogers, R. H. J. Pennefather, L. G. Drew, A. C. F. Boulton, A. D. Creasor, J. E. O'Meara, T. Hislop, F. McPhillips, O. L. Spencer, P. M. Bankier, G. H. Kilmer.

February 8.—F. A. Munson, A. L. Smith, G. C. Campbell.

February 12.—J. S. Campbell, M. J. McCarron, S. A. Jones, J. H. Burnham, R. G. Fisher, J. S. Skinner, G. S. Wilgress.

February 18.—R. S. Hayes.

The following gentlemen passed the First Intermediate Examination, viz.:—E. O. Swartz, honors and first scholarship, and Messrs. G. W. Bruce, D. H. Chisholm, F. B. Geddes, J. T. Hewitt, F. S. Mearns, A. E. Cole, G. W. Littlejohn, V. C. McGirr (as student only), H. B. Cronyn, W. C. Mikel, S. H. Bradford, M. S. Mercer, R. E. Lazier, P. K. Halpin, A. S. Ellis, W. J. L. McKay, W. A. Thrasher, N. Mills, A. G. Farrell, F. Rohleder, J. W. S. Corley, A. E. Baker, W. A. Smith, E. L. Elwood, A. A. Adams.

The following gentlemen passed the Second Intermediate Examination, viz.:—H. L. Dunn, honors and second scholarship, and Messrs. T. Reid, W. H. Wallbridge, F. Smoke, A. Stevenson, W. Green, C. A. E. Blanchet, W. E. Fitzgerald, W. C. Fitzgerald, E. C. Emery, R. Ruddy, R. M. Dennistoun, A. R. Bartlet, W. D. Gregory, C. R. Hanning, E. H. Jackes, G. F. Bradfield, J. Coutts, A. D. Dickson, J. E. Hansford, F. C. Jarvis.

The following gentlemen were admitted into the society as Students-at-Law:—

Graduates.—E. Elliott, D. Hooey, S. S. Reveler, G. A. Cameron, A. Constantineau, A. W. Anglin.

Matriculants.—W. R. Garrett, W. C. McCarthy, N. W. Ford, J. H. H. Hoffman, J. J. Warren.

Juniors.—W. M. Campbell, R. Parker, J. S. Denison, W. G. Owens, F. R. Martin, J. B. McLeod, J. G. Farmer, J. E. Cook, F. W. Wilson, A. B. Armstrong, O. Watson, S. A. C. Greene, H. R. McConnell, J. Anderson, F. Elliott, J. W. Winnett, A. S. Burnham, J. H. D. Hulme.

Articled Clerks.—W. H. P. Walker, G. S. Macdonald.

MONDAY, 7TH FEBRUARY, 1887.

Convocation met.

Present—Messrs. Falconbridge, Hoskin, Irving, Kerr, Mackelcan, McMichael, Martin, Moss, Purdom and Robinson.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The minutes of last meeting were read, approved and signed by the Chairman.

The report of the Finance Committee in the matter of the Hon. W. McDougall was received and adopted.

Mr. Murray presented the second report on Finances from the same committee, which was read as follows:—

To the Benchers of the Law Society in Convocation:—

The Finance Committee beg leave to report as follows:—

They have caused a balance sheet of the receipts and expenditure for the year 1886 to be prepared and audited by the Society's Auditor.

They have also prepared a sheet shewing the estimates for the year 1887 and submit same herewith.

The report was adopted.

ABSTRACT OF BALANCE SHEET FOR 1886.

RECEIPTS.

Certificate and Term Fees ...	$20185 50	
Less Fees returned.....	60 50	
		$20125 00
Notice Fees.....	$659 00	
Less Fees returned.....	2 00	
		657 00
Attorneys' Examination Fees.	$7368 00	
Less Fees returned.....	906 00	
		6462 00
Students' Admission Fees....	$8440 00	
Less Fees returned.....	960 00	
		7480 00
Call Fees	$13390 00	
Less Fees returned.....	2425 00	
		10965 00
Interest and Dividends		3335 35
Sundries—		
Fees on Petitions, Diplomas, etc.		116 00
Reports sold		1480 04
		$50620 39

EXPENDITURE.

Reporting—		
Salaries.....	$8933 34	
Printing	11618 21	
Notes of cases	205 87	
		$20757 42
Examinations—		
Salaries	$3200 00	
Scholarships	1400 00	
Printing and Stationery....	281 50	
Examiners for Matriculation	236 50	
		5118 00
Library—		
Books, Binding and Repairs.	$2879 39	
New Catalogue	1311 10	
County Libraries Aid	2305 92	
		6496 41
General Expenses—		
Salaries—		
Secretary, Sub-treasurer and Librarian.....	$2000 00	
Assistants.....	1358 30	
Housekeeper	360 00	
		3718 30

LAW SOCIETY.

Lighting, Heating, Water & Insurance—		
Gas	$184 41	
Water	96 02	
Insurance	140 00	
Fuel, including payment to Government for two years, $1700	2037 70	
Repairs to apparatus	86 99	
Carting coal and cutting wood	2 25	
		2547 37
Grounds—		
Gardener and Assistant	$675 32	
Tools	64 40	
Cartage	6 00	
Labour	14 25	
Snow clearing	28 43	
		788 40
Sundries—		
Postages	$84 17	
Advertising, including *Law Journal* account	168 50	
Stationery, Printing, etc	307 17	
Law costs	603 43	
Furniture	112 40	
Repairs	335 22	
Term lunches	652 55	
Telephone office	394 57	
Auditor	100 04	
Sanitary Engineers, McDougall & Gray, $100; Scrutineers. $400	500 00	
Carpenter, $111.36; Résumé, $60.02	171 38	
Repairs to clocks, $10; Law Charts, $7.50	17 50	
Caretaker, $10; Ex. Coll. Huron and Erie Deb. $10,000, $9.25	19 25	
Woodenware, $10.05; Map, $8	18 05	
Distributing Catalogues	11 75	
Estimating value of books in Library	50 00	
Attendance on Painters	14 75	
Guarantee Co., $20; Oiling floor, $18.25	38 25	
Cleaning windows, $34; Dusting books, $22	56 00	
Gratuities, Messrs. Brown & Macrae	20 00	
Petty expenses	37 75	
		3712 73
Balance		7481 76
		$50620 39

Audited and found correct.

(Signed) HENRY WM. EDDIS,
Auditor.

TORONTO, 27th Jan., 1887.

Mr. Moss presented the report of the Committee on Legal Education, on the case of Thomas Urquhart, which was adopted.

The petition of Mr. G. W. Burbidge was presented and read.

Ordered, That it be referred to a special committee, composed of Messrs. Maclennan, Mackelcan and Moss, to ascertain whether Mr. Burbidge has complied with the Rules of the Society, and also to report upon his examination before them, upon the subjects which are now prescribed for call in accordance with Rules 94 and 95.

Mr. Moss, pursuant to notice, introduced a Rule to give effect to the joint report of the Legal Education and Finance Committees, on the subject of the admission of Articled Clerks and Students-at-Law.

The Rule was read a first and second time, and is as follows:

That Rule 2 of Section V. be amended by adding thereto the following:

2. (*a*) Any person who has passed the preliminary examination for Articled Clerk, on subsequently presenting himself within five years thereafter for examination for Student-at-Law, shall pay instead of $50, the sum of $10.

And that Rule 3 of Section XV. be amended by adding after the figures $50, "unless he shall have within the preceding five years passed the preliminary examination for Articled Clerks, in which case he shall pay, instead of $50, the sum of $10."

The Rule was ordered to be read a third time to-morrow.

The letter and petition from W. H. Sibley were received and read.

Ordered, That the report of the Committee in the matter of W. H. Sibley be adopted.

Ordered, That Mr. J. Winchester be appointed Inspector of County Libraries, and that he be paid the sum of $100 for his inspection of the Libraries for the year 1887.

The Special Committee on Honors and Scholarships presented their report, which was received, read and adopted.

Ordered, That Mr. E. O. Swartz be declared to have passed the First Intermediate Examination with honors, and be paid the sum of $100, the amount of the first scholarship.

Ordered, That Mr. H. L. Dunn be declared to have passed the Second Intermediate Examination with honors, and be paid the sum of $100, the amount of the first scholarship attached to this Examination.

Convocation adjourned.

TUESDAY, 8TH FEBRUARY, 1887.

Convocation met.

Present—Messrs. Falconbridge, Ferguson, Hoskin, Irving, Lash, Mackelcan, Moss and Murray.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The minutes of the last meeting were read, approved and signed by the Chairman.

Ordered, That the Rule relating to the fees to be paid by Students-at-Law and Articled Clerks, which had been read a first and second time on the 7th inst., be now read a third time.

The Rule was read a third time and passed.

Mr. Hoskin presented the report of the Discipline Committee, with reference to the complaint of the Trustees of the General Hospital, reporting that a *prima facie* case had been made out.

The report was received.

Ordered, That it be considered on the first Tuesday of Easter Term next.

Ordered, That the Secretary be instructed to erase the name of W. H. Sibley from the Roll of Students-at-Law and Articled Clerks, and from such books or rolls as his name appears in of record as Student-at-Law or Articled Clerk.

Ordered, That Messrs. Ferguson, Hoskin and Lash be added to the Special Committee to examine into the papers and qualifications of Mr. G. W. Burbidge, a candidate for call to the Bar under the Rules in special cases.

The Special Committee, to whom was referred the special case of Mr. G. W. Burbidge, presented their report stating that the said G. W. Burbidge had complied with all the Rules of the Society in that behalf, and was entitled to be called to the Bar.

The report was received, read, considered and adopted.

Convocation adjourned.

SATURDAY, 12TH FEBRUARY, 1887.

Convocation met.

Present—Messrs. Hoskin, Irving, Lash, Mackelcan, Maclennan, McMichael, Meredith, Moss, Murray, Osler and Robinson.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The minutes of the last meeting were read, approved and signed by the Chairman.

Mr. Maclennan presented the report of the Reporting Committee which was read, considered and adopted.

A petition from the members of the Bar of Ontario, in reference to the 50th anniversary of Her Majesty's accession to the Throne was received.

Ordered, That a special call of the Bench be made for the first Tuesday of Easter Term, to take the petition into consideration.

The petition of Mr. John MacGregor was read and considered.

Ordered, That the petition be referred to the Reporting Committee for consideration and report.

The Secretary laid before Convocation the List of Solicitors who had taken out their Annual Certificates.

Ordered, That the same be submitted at the next meeting of Convocation.

Convocation adjourned.

FRIDAY, 18TH FEBRUARY, 1887.

(Subject to confirmation at next meeting of Convocation.)

Convocation met.

Present—Messrs. Foy, Irving, Lash, Maclennan, Moss, Murray and Osler.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of the last meeting were read, approved and signed by the Chairman.

The report of the Reporting Committee, on the petition of John MacGregor, was read, approved and adopted.

The Secretary laid on the table a statement of Insurance Policies current.

It was referred to the Finance Committee to consider his observations thereon.

The letter of E. E. Kittson, Secretary of the Hamilton Law Association, was read.

Ordered, That Mr. Kittson's letter, in so far as it refers to students' books, be referred to a special committee, consisting of the Finance Committee and Messrs. Moss, Meredith, Britton and McMichael, to report to Convocation upon the subject, together with the system to be adopted to carry out the Rules of Convocation, relating to students' books for County Libraries,

and further, to report to Convocation upon rules to be observed by students on the occasions of obtaining and borrowing students' books,

Ordered, That the letter from Mr. J. R. Cartwright on the subject of his Digest of Constitutional Cases, be referred to the Reporting Committee with power to act, if necessary, to act before next Term.

The Secretary, in pursuance of the order of Convocation of 12th inst., submitted the List of Solicitors who had taken out their Certificates for the period ending on the first day of Michaelmas Term, 1887.

Convocation adjourned.

REPORTS.

ONTARIO:

ASSESSMENT CASE.

IN THE COUNTY COURT FOR THE COUNTY OF BRANT.

[Reported by W. D. Jones, Esq., Barrister-at-Law.]

IN RE PEARSON.

Tax exemption—"The Assessment Amendment" Act, 1885—Parsonage—Superannuated minister of the Methodist Church.

On a claim for exemption under section 12 of the Assessment Amendment Act, 1885, it appeared that the claimant was a superannuated minister of the Methodist Church. He had no business or calling other than the duties incident to his office as superannuated minister; was without charge of any congregation or circuit; but was expected to do occasional ministerial work when required. He was not paid any ministerial stipend or salary, but paid a small allowance from the superannuated ministers' fund. The house on which exemption was claimed was owned and occupied by himself; not provided for by the church or any congregation, and not a parsonage provided for the minister by the congregation where he resided. There was a parsonage occupied by the officiating minister in that place.

Held, that the claimant was not entitled to exemption.

In re appeal of Rev. S. M., 22 C. L. J. 341, concurred in.

[Brantford.—Jones, Co. J.

Appeal by Rev. Thomas D. Pearson from the Court of Revision of the city of Brantford.

The appellant, a superannuated minister of the Methodist Church, was assessed for his dwelling $4,000.00. In his appeal to the Court of Revision he claimed that it was exempt to the extent of $2,000.00, under the 12th section of "The Assessment Amendment Act, 1885," as a parsonage, or dwelling occupied as such. The Court of Revision disallowed his appeal, and from that decision he appealed to the county judge.

A. J. Wilkes, for the Court of Revision.

Mr. Pearson in person.

JONES, Co. J.—The 12th section of "The Assessment Amendment Act, 1885," provides that "the stipend or salary of any clergyman or minister of religion while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of one thousand dollars and the parsonage, when occupied as such or unoccupied, and if there be no parsonage the dwelling-house occupied by him with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value. This sub-section shall not apply to a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty."

Mr. Pearson, as appears from his examination before me, is a superannuated minister of the Methodist Church. He has no business or calling other than the duties incident to his office as such superannuated minister. As such he has not charge of any congregation or circuit, but is expected to do such occasional preaching and ministerial work as may be required of him from time to time.

Mr. Pearson does not receive any ministerial "stipend or salary" from any congregation, but is paid a small allowance annually from the superannuated ministers' fund of the Methodist Church, the amount so received being in proportion to the number of years he has been in the active work of the ministry of the church before superannuating.

The house for which the exemption is claimed is owned and occupied by himself. It is not provided for him by the church, or by any congregation. In his evidence he says that it is not a parsonage, but that there is a parsonage provided for the minister of the congregation in Brantford, where he, Mr. Pearson, worships, and which is occupied by that minister, and is allowed the exemption as a parsonage as provided under the Act.

I think that the word "parsonage" in the section referred to means a house or dwelling used as the residence of a minister in charge of a circuit or congregation. I do not think that the appellant's house is such a parsonage. If it were, then it might happen that though there were but one minister in charge of a circuit or congregation, there might be a half a dozen parsonages, if there

were that many superannuated ministers residing on that circuit.

I think also that the first part of the section shows that the class of men entitled to this exemption are those only that are in the ordinary service of the church as ministers in charge of congregations. The words "stipend or salary" mean in their ordinary acceptation an annual payment as wages for services annually performed. Mr. Pearson is in receipt of no such stipend or salary.

I regret that in coming to this decision I have had to differ from the judgment given by his Honor Judge McDougall as reported in the *Law Journal* for 1886, page 158. But I agree with the judgment of McDonald, County Judge, as reported in same volume, page 341. I concur in the opinion expressed by Judge McDougall that the legislature should so amend this section as to make its proper construction free from doubt, and more especially so now, as there are conflicting decisions as to its proper interpretation.

I affirm the decision of the Court of Revision, and dismiss the appeal.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

QUEEN v. WALKER.

Canada Temperance Act, 1878, *sections* 108, 109, 111, 119—*Search warrant, when proper to be issued—Certiorari, when taken away—Presumption that liquor kept for sale, when created by the finding of appliances for sale—Municipal by-law under the Act—Search warrant and conviction quashed with costs.*

An information charging defendant with having sold intoxicating liquor was laid before two justices of the peace, and immediately afterwards a further information to obtain a search warrant was sworn by the same complainant before the same two justices. Thereupon, a warrant to search the premises of defendant was issued, under the hand and seal of one only of the two justices: upon the search being made three bottles were found, each containing intoxicating liquor, and it was sworn that there were also found in defendant's house other bottles, some decanters and glasses, and a bar or counter.

On the day following the search, the complainant laid a new information before the same two justices of the peace, charging defendant with keeping intoxicating liquor for sale. Upon the hearing, the constables who executed the search warrant were the only witnesses examined, and on their evidence the defendant was convicted.

Upon motion to quash the search warrant and conviction,

Held, that sections 108 and 109 of the Act were intended to provide process *in rem* for the confiscation and destruction of liquor in respect of which a use prohibited by the Statute was being made, and not to provide a means of obtaining evidence on which to found a prosecution or support one already begun.

Held, also, that this warrant in this case was illegal because issued by one justice of the peace only.

Held, that the operation of section 111 of the Act in taking away the right to certiorari, is confined to the case of convictions made by the special officials named in the section.

Held, further, that the presumption of keeping liquor for sale created by section 119 of the Act, arises only where the appliances for sale of liquor mentioned in the section, together with the liquor, are found in Municipalities in which a prohibitory by-law passed under the provisions of the Canada Temperance Act is in force.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the justices of the peace and the informant were ordered to pay the defendant's costs.

REGINA v. FRENCH.

REGINA v. ROBERTSON.

Canada Temperance Act, 1878—Adjournment for more than week—32-33 *Vict., ch.* 31, *sec.* 46 *(D.)—Conviction quashed—Consent—Jurisdiction.*

Where the magistrate adjourned the hearing of a case under the Canada Temperance Act, 1878, for more than a week, contrary to 32-33 Vict., ch. 31, sec. 46 (D.), the conviction was quashed, but without costs.

Semble, The consent of the defendant to the adjournment, if proved, would not have given jurisdiction.

CHANCERY DIVISION.

Div'l Court.] [January 8.

RE MOOREHOUSE v. LEAK.

Mechanics' Lien—R. S. O. c. 120—*Jurisdiction of Master in Chambers to annul the registration of a lien—Directing issue—Time of filing lien.*

The Master in Chambers has jurisdiction to entertain a motion under R. S. O. 120, s. 23, to annul the registry of a mechanics' lien when the amount in question is over $200.

The question as to whether an issue should be directed to try an issue as to a mechanics' lien rests in the discretion of the judge.

The time within which a lien must be filed is not measured by the durations of the deliveries under the contract between the material man and the contractor, but by the completion of the work by the contractor for the owners for whom he is working.

J. B. Clarke, for the owner.

F. Hodgins, for the lien holder.

Ferguson, J.] [January 19.

CLARKSON v. ONTARIO BANK.

*Assignments for benefit of creditors—*48 *Vict. c.* 26 *(O.)—Retrospectivety—Intra vires.*

Demurrer to a statement of claim.

Held, following *Broddy* v. *Stewart*, that 48 Vict. c. 26 (O.), is *intra vires* the Provincial Legislature.

Held, also, the plaintiff seeking by his pleading to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under the said Act, but before the said Act came into force), that the plaintiff's pleading could not be sustained either on the ground of the statute being retrospective, or on the ground that what the plaintiff sought to obtain was defined and given by s. 3, sub-s. 3.

Moss, Q.C., for demurrer.

Macdonald, Q.C., contra.

Ferguson, J.] [January 24.

CITY OF LONDON v. CITIZENS INS. CO.

Guarantee—Sureties to same principal debtor but by separate contracts—Contribution—Discharge.

Action on a guarantee policy of defendants' company, whereby the honesty in office of B., the plaintiff's chamberlain, had been guaranteed, who, however, had been guilty of large defalcations. It appeared that one D. had also given the plaintiffs a similar bond guaranteeing B.'s honesty in office. The defendants contended that the plaintiffs had released D. from liability under his bond, and that this operated as a release of themselves. The defendants did not contract jointly with D., nor did D. contract with them—they could not be considered as joint contractors or joint sureties.

Held, under these circumstances, that even if it were the case that D. had been wholly released by the plaintiffs, the defendants would not be discharged *in toto* from liability on their contract, but only to the extent of the right of contribution from D., which they had lost by D.'s release.

Ward v. *National Bank of New Zealand*, L. R. 8 App. Cas. 765, followed.

Soon after B.'s defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realize and apply the money therefrom towards satisfying B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants

were not liable, since by a condition of their policy they were not liable except for losses occurring within a year before notice of claim made to them.

Held, that the case was similar to a payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case.

Held, also, that the defendants should pay interest on the amount due from them, from three months after the proofs of loss were delivered.

Meredith, Q.C., for plaintiffs.

Rae, for defendants.

Creelman, for the guarantee company, which had been added as parties.

Proudfoot, J.] [February 2.

COMSTOCK v. HARRIS.

British ship—Alien mortgagee—Imp. Stat. 17 & 18 Vict. c. 104.

The mortgagee of a British ship is not an owner within the meaning of Imp. Stat. 17 & 18 Vict. c. 104, and there is no provision in that Statute to prevent an alien being a mortgagee.

James Maclennan, Q.C., for the mortgagee plaintiff.

Lash, Q.C., for the mortgagor defendant.

Proudfoot, J.] [February 23.

RE CANNON, OATES v. CANNON.

Administration order—Effect in saving claims from being barred—Champertous agreement.

After the decision in this case, noted *supra* p. 55, and in November, 1886, the notes in question were handed back to H. & Co. On November 30th, 1886, H. & Co. obtained leave from the Master to come in and prove their claim. From this order M. E. C., the administratrix, now appealed, on the ground that at the time of the order of administration being made, H. & Co. were not the holders of the notes, and that before they came back into their hands they were barred by the Statute of Limitations, and that H. & Co. were bound by the above decision against the notes in O.'s hands.

Held, that the order of administration, which was made before the period allowed by the Statute of Limitations had expired, prevented the remedy on the notes being barred.

Held, also, that H. & Co. might assert their title to the notes, and prove upon them notwithstanding the champertous agreement with O.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the appeal.

Arnoldi, contra.

Proudfoot, J.] [February 23.

WOODWARD v. MCDONALD.

Reference to arbitration—Scope of reference—Construction of agreement.

By a consent judgment in an action between members of a certain association for the sale of lubricating oil, it was provided that "all matters which may hereafter come into dispute between the association or board of directors thereof, or any member or members . . relative to the said agreement" (sc., the original agreement of association), "or any alleged breach of non-observance thereof, or of any of the rules or regulations made or to be made by the said board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbitration as therein specified.

Acting under the agreement, the board had fixed a certain sum to be paid per gallon to the association by the parties thereto, on the sale of any lubricating oil.

A dispute now arose on the motion of one of the members as to whether the three cents per gallon were payable on sales made by one member of the association to another, and whether the rate was payable upon the proportion of distilled petroleum used in making axle grease.

Held, that these matters were properly within the scope of the arbitrator under the above clause in the judgment, though they amounted to a dispute upon the construction of the agreement, and the rules made under it.

Street, Q.C., for the defendant, McDonald.

Magee, for the plaintiffs.

PRACTICE.

Boyd, C.] [February 14.

COMSTOCK v. HARRIS.

Discovery—Examination of party resident out of jurisdiction—Appointment and subpœna—Conduct money—Convenience—Production of books—Staying action.

When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpœna, as in the case of resident litigants, is sufficient to compel his attendance; and it lies upon the party so served to object at the time to the payment made for conduct money.

It is not reasonable that books in constant use in business should be brought into the jurisdiction from a foreign country for the purposes of an examination, unless the examiner in the course of the examination rules that they are necessary.

Upon failure of the plaintiff to attend for examination, pursuant to the subpœna and appointment served upon him, the action should not be stayed till he does attend; it is sufficient to impose a stay for a definite time.

Langton, for the plaintiff.

Holman, for the defendant.

Rose, J.] [March 1.

WRIGHT v. WRIGHT.

Interlocutory costs—Staying proceedings—Trespass.

Where the plaintiff is acting in good faith his action should not be stayed for non-payment of interlocutory costs; and an action of trespass is in that respect in no way different from any other.

Stewart v. *Sullivan*, 11 P. R. 529, followed.

Beck, for the plaintiff.

W. H. P. Clement, for the defendant.

Chancery Divisional Court.] [March 5.

TEMPERANCE COLONIZATION SOCIETY v. EVANS.

Jury notice—Money demand—Preliminary question—Severing issues—Rule 256, O. J. A.—Trial judge—C. L. P. Act, sec. 255.

The order of PROUDFOOT, J., *ante* p. 37, striking out the jury notice was reversed, and the jury notice restored.

Held, a proper case in which to exercise the power under Rule 256, O. J. A., of severing the action so as to have that part of it which is preliminary tried first, the defendants having a *prima facie* right to a jury (unless the judge at the trial dispenses with one), as to the main matter in controversy, viz., the plaintiffs' demand for payment of instalments due under the scrip contract; while the other claim of the plaintiffs, viz., for a declaration of their right to specific performance of settlement duties, could be better tried without the intervention of a jury.

Per PROUDFOOT, J., who retained his former opinion. The court or a judge has power by the C. L. P. Act, s. 255, to act before the trial by striking out the jury notice, and the power should be exercised when it is perfectly clear that the issues are such that they cannot be properly tried by a jury; the question should not in every case be left to the trial judge to determine.

Hoyles, and *A. D. Cameron*, for the defendants.

Lount, Q.C., and *A. H. Marsh*, for the plaintiffs.

Chancery Divisional Court.] [March 5.

ANDREWS v. CITY OF LONDON.

Costs, scale of—"Event"—Trial—Rule 511—Set-off.

The parties by consent allowed a verdict for the plaintiff for $1, to be taken before the judge at the assizes, to be altered according to the result of a reference agreed upon, and also agreed that the costs should abide the event. The action was for damages for negligence, and the award was in favour of the plaintiff for

$85. A question having arisen as to the scale of costs,

Held, following *Watson* v. *Garnett*, 3 P. R. 74, and *Hyde* v. *Beardsley*, 18 Q. B. D. 246, that "costs to abide the event" does not mean that the plaintiff, if successful, shall necessarily have full costs, but that he shall have such costs as, under the statutes and rules of court, a plaintiff recovering the amount that he recovers by the event is entitled to.

Held, also, following *Cumberland* v. *Ridout*, 3 P. R. 14, that the final judgment by means of the reference was to be regarded as obtained without a trial, and the costs therefore depended upon Rule 511, under which the taxing officer was directed to proceed.

There should be no set-off of costs; such a result is not contemplated by Rule 511, and it is not a fair construction to incorporate with it the provisions of R. S. O. c. 50, s. 347, that section being restricted to a case where there is a trial.

White v. *Belfry*, 10 P. R. 64, commented upon.

Shepley, for the defendants.

Aylesworth, for the plaintiff.

Chancery Divisional Court.] [March 5.

McGUIN v. FETTS.

Receiver—Right of action—Amendment.

A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by an order made without notice to the alleged debtor, authorizing him to sue in his own name.

But where, by an *ex parte* order made in the suit in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain Grange, and brought this action pursuant thereto, it was

Held, that an amendment should be made, adding the Grange as co-plaintiffs, without security being given for their costs.

Reeve, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

Chancery Divisional Court.] [March 5.

KNAPP v. KNAPP.

Interim alimony—Disbursements—Separate estate—Status of married women.

The peculiar practice of awarding interim alimony and disbursements in alimony suits is founded on the presumption that the husband has everything and the wife nothing, but when the contrary appears the presumption is done away; and the court will, on applications for *interim* alimony, consider the question of the wife's ability to maintain herself out of separate estate or other sources of income, such as her earnings and allowances from her friends.

And where the wife had been living apart from her husband for five years, and had been supporting herself out of the rents of houses owned by her, and by taking boarders, and through assistance rendered by members of her family, the court refused to award *interim* alimony, but directed the husband to pay the prospective cash disbursements of the plaintiff's solicitors upon their undertaking to account it.

Per BOYD, C. The change in the status of married women under recent legislation has no effect upon the law as to alimony, unless the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimentation pending the action for alimony.

H. J. Scott, Q.C., for the defendant.

Holman, for the plaintiff.

Rose, J.] [March 8.

CHICK v. TORONTO ELECTRIC LIGHT CO.

Costs, scale of—Rule 218—Money paid into court with defence.

The plaintiff in an action in the High Court of Justice claimed $296.14, the balance of an account of $896, for rent and goods sold and delivered.

The defendants in their statement of defence admitted a liability of $170.30, but claimed a credit of $81.14, leaving a balance due of $89.16, which they brought into court with their defence.

The plaintiff served notice under Rule 218

accepting the amount paid in full of the claim, and proceeded to tax his costs. Upon taxation a question arose as to the scale of costs.

Held, that the provision in Rule 218, that the plaintiff may tax his costs, does not give him costs according to any higher scale than if he had entered judgment for the sum which he received out of court; the costs should therefore be on the County Court scale, as the whole amount of the account was over $800, and the amount admitted by the defendant was $170.30.

Lefroy, for the defendants.

W. T. Allan, for the plaintiff.

IN RE DOYLE V. HENDERSON.

Rescinding order—Powers of judge—Appeal.

A motion made to the Master in Chambers on the 27th October, 1886, to rescind his own *ex parte* order of 13th October, 1886, allowing the executrix of the plaintiff to issue execution for the costs of a motion for prohibition, was referred to a judge in chambers. The motion was made after execution had been issued and placed in the sheriff's hands.

Held, that neither the Master nor the judge in chambers had the power to rescind the order; and the motion was too late to be treated as an appeal.

McNab v. *Oppenheimer*, 11 P. R. 223, followed.

Stainer v. *Evans*, W. N. Dec. 25, 1886, p. 210, considered.

V. MacKenzie, Q.C., for the defendant.

W. H. Blake, for the plaintiff.

IN RE THE WESTERN FAIR ASSOCIATION V. HUTCHINSON.

Prohibition—Division Court—Corporation—Question of fact.

Motion for prohibition to a Division Court on the ground that the Western Fair Association did not exist in fact or in law, and could have no title to the grand stand in dispute, and therefore the court had no jurisdiction to enforce the judgment in the suit.

Held, that the question of corporation or no corporation was one of fact, and that the decision thereon was not reviewable in prohibition.

Aylesworth, for the defendant.

W. H. P. Clement, for the plaintiff.

HAMILTON LAW ASSOCIATION.

A special general meeting of the Association was held yesterday at the Library to consider the proposed revision of the rules relative to practice.

Mr. Irving, Q.C., the President, was in the chair, and the following gentlemen were present:—Messrs. Mackelcan, Q.C., Martin, Q.C., Lazier, H. A. Mackelcan, Culross, Bicknell, K. Martin, Bruce, Q.C., Waddell, Duff, Burton, Gausby, P. D. Crerar, Kittson.

The following report of the Legislation Committee appointed by the Trustees was read:

"At the request of the Trustees the Legislation Committee have examined the draft of the proposed Revised Rules for Practice, to take effect with the Consolidated Statutes, and beg to report as follows:

"As the proposed Rules were only received a few days ago, and but one copy could be obtained from Mr. Langton, it was impossible to examine them at all critically. Some suggestions, however, have been made which your Committee would recommend for consideration; they appear in the schedule to this report; these refer to the Rules as framed.

"In order that all the Rules of Practice may be completely consolidated, your Committee think it would be desirable to abolish all prior Acts and Rules in any way affecting practice or procedure, and to declare that in all matters unprovided for, the provisions of the Consolidated Rules shall, as nearly as may be, apply, so that in any such matters an analogous practice may be created.

"Your Committee also think that in any event the practice should be precisely the same in all divisions.

"Your Committee think that a sufficient time has now elapsed to test the working of the Judicature Act, and that a favourable opportunity is now presented for effectuating the main object of that Act in abolishing all distinctions between the Courts. And they would recommend that steps be now taken to obtain a complete and perfect fusion of the three Divisions of the High Court of Justice, so that all may not only possess the same jurisdiction but may exercise it in exactly the same way.

"As the questions for consideration are of great importance, your Committee would suggest the desirability of having a convention of delegates from all the Law Associations of the Province in order that the views of the Bar generally may be ascertained, as it might be desirable to delay the issue of that portion of the statutes relating to the practice until next year, if similar ideas are entertained throughout the Province."

On motion this report was adopted.

The resolutions of the County of York Law Association on the same subject were read, and on motion the following were adopted:

1. One judge should sit in each week for the disposal of all business of the High Court required to be done in Court and in Chambers without regard to the Divisions in which the actions are pending.

2. A uniform practice should be adopted in all the divisions of the High Court, including therein the practice at the sittings of the various Divisional Courts.

3. It would be expedient to have four sittings, held at permanent and fixed dates for the trial of non-jury cases at two or more of which sittings jury cases shall be tried, as may be determined by several orders of the court.

4. And earnest effort should be made to secure a suitable increase of the judges' salaries.

Hamilton Law Association—Mr. Wicksteed, Q.C.

Messrs. Martin, Q.C., and Mackelcan, Q.C., and Teetzel, were appointed delegates to represent the Hamilton Association at any meeting to be held in Toronto on the subject of the revision of the rules.

A letter was read from the Vice-President, Mr. Justice Robertson, resigning his position on account of his appointment to the Bench, and the following resolution was carried:

"That the Association take this opportunity of congratulating Mr. Thomas Robertson, Q.C., on his appointment to the Bench, and expressing their appreciation of his uniform kindness and courtesy as Vice-President of the Association, and the hope that he may long be spared to adorn the high and honourable position to which he has been promoted."

And Mr. Justice Robertson was also requested to dine with the Association.

In view of the important changes which are now taking place in connection with the revision of the practice a hope was expressed that members of the Bar throughout the Province would join in the movement and give it as much strength as possible. The Toronto, London and Hamilton Associations are taking active steps in the matter, but the hearty co-operation of the Bar throughout the Province is very desirable.

MR. WICKSTEED, Q.C.

We take great pleasure in extracting from the columns of the Ottawa *Citizen* the following references to an old friend of this journal, Mr. G. W. Wicksteed, Q.C., late Law Clerk of the House of Commons. The country has in him lost a most valuable and faithful servant. We trust he may live long to enjoy his well earned repose.

"When the next Parliament meets, one familiar face of the official staff will be missing. It has been known to three generations of politicians, and its absence cannot but be felt, especially by the older members who return to Ottawa. We allude to Mr. Wicksteed, who for nearly half a century has performed the important duties of law clerk to the Canadian Legislative Assembly and House of Commons. After this long period of official life, at his own request he has been relieved of his duties. Dr. Wilson, so long his efficient assistant, has been appointed to the position, with the creditable distinction of the recommendation of Mr. Wicksteed to succeed him.

"There are few men in any career, who have so ably, so continuously and so unexceptionably played their part on life's stage; close upon his ninetieth year, retaining his faculties, his memory, with unimpaired power, and, what is more remarkable, with all the geniality, with that milk of human kindness which are to be found in young and hopeful men, as yet unsoured by disappointment. Mr. Wicksteed is still the charm of the society which numbers him among its members. As we write of him we seem to go back to an epoch known to us only as history. Nelson's funeral took place on the 9th January, 1805. Mr. Wicksteed has a perfect recollection of having been sent from his uncle's house in Cecil street to a Coffee House in the Strand, from the balcony of which he saw the last honours paid to the great admiral as his coffin was carried eastward to St. Paul's.

"Mr. Wicksteed was induced by his uncle, Mr. Justice Fletcher, brother to Sir Richard Fletcher, of the Engineers, who fell at Saint Sebastian, to try his fortune in Canada. He arrived in 1821, in his twenty-second year, and, as was natural with such an introduction, his attention was directed to law. In those days French was of infinitely more importance to any one seeking a public position than it is at present.

"When Mr. Wicksteed arrived in Canada, Lord Dalhousie was Governor-General; one of the noblest and purest characters in Canadian history. At that date French-Canadian political thought was in the infancy of its training, and at the interval of half a century there are few high-toned French-Canadians who can read the part taken by the prominent among their countrymen without a blush. French was then indispensable. However fully the Merchant Tailors' School had furnished Mr. Wicksteed with an acquaintance with Horace and Tacitus, Xenophon and Thucydides, it had given him but a superficial knowledge of the language of Moliere. But this very classical training enabled Mr Wicksteed rapidly to master the language. The universal character of grammar, the Latin etymology of much of the French, his training, which had taught him how to study, came to his aid. Very soon the question was resolved into a matter of memory: to learn words in French which differed from those in English. We believe it was Mr. Wicksteed who translated into English, in their day the celebrated ninety-two resolutions of Mr. Papineau. Mr. Wicksteed became a student of Mr. Gugy, and in 1828 was appointed assistant law clerk to the Provincial Legislature. During the stormy period which succeeded, in the days of Lord Aylmer and Lord Gosford, on the suspension of the constitution after the rebellion, Mr. Wicksteed was attached to the office of Mr. Ogden, then Attorney-General. On the Union of Canada in 1841, he was appointed law clerk to the young Assembly of Canada, and has filled the same position in the parliament of the Dominion, the whole period extending over fifty-eight years.

"The versatility of his attainments, and his varied reading have been of much assistance to Mr. Wicksteed in the execution of his arduous, and somewhat prosaic, duties. The mere lawyer finds it difficult to drop the barbarism of phrase to which he was accustomed in his young days, hence Acts of Parliament are often marked by a verbiage which cumbers rather than is explanatory. There is the opposite extreme which is tempted to sacrifice prudence of phraseology to a brevity which would be seemly if it gave security, but which not unfrequently falls in its purpose. It is the true ability which can steer between these excesses. The long experience of Mr. Wicksteed, blended with a rare judgment, and based on a well-balanced, well-educated mind, have given an impress to the statutes drawn up by him, so that their language is precise and free from ambiguity, commanding the respect of the first lawyers in the country.

"The abilities of Mr. Wicksteed led to his frequent employment on important commissions. On every occasion when his services have been appealed to, he has shown the strong good sense, and undeviating integrity of his character. And this ability has been enlisted under many varied conditions. Few men indeed have lived to see such changes. When he came to the country the first steamboat had been but twelve years on the Saint Lawrence. The Lachine Canal had not been commenced. The only improve-

ments to navigation were the three small *batteaux* locks, constructed, shortly after the conquest, to escape to some degree, the 'Cascades' 'Cedars' and 'Coteau' Rapids. The population of the two Provinces scarcely reached four hundred thousand—of which under one-third was in Western Canada. At this date the historian traces the introduction of luxury, and the political theorist bewails the commencement of the lines of party; whereas on the other hand, the mind educated to politics can recognize no other means of carrying on a Government, as the teachings of the last two centuries since the Revolution of 1688 establish. The theorist sees the evils of the system, many of which are undeniable. He fails to understand the restraints which the system exacts, and that it is only by the spirit of compromise that Government can be practically carried on. At this date Montreal had some eight thousand inhabitants. Toronto was little more than a large self-asserting village. Manufacturers were few. There was little enterprise. Every interest was in its infancy. The whole development of the country lay in the future. Mr. Wicksteed has lived to see Canada extend across the Continent. The disunited provinces, which in those days knew little of each other but by name, formed into a concrete unity. During the whole of this fifty-eight years, Mr. Wicksteed has advanced with the movement; and in his happy cosmopolitanism, he is as much at home in our present condition as when he translated in the House of Assembly at Quebec in the days of Lord Dalhousie, or aided Mr. Ogden in drawing up Ordinances for the Special Council.

"No man ever retired from public life more respected and honoured. Faithful to every Administration while in power, he fulfilled his obligations, without servility and with consistent integrity. No betrayed confidence was ever traced to his faithlessness. The feeling of respect was universal with all brought in contact with him. His career is one to be held forth for our youth to follow. He possesses a reputation so untarnished, so high, so good, that he will be long remembered, especially by the older members. Whatever the abilities and experience of Dr. Wilson—and we have no desire in any way to throw doubt upon them, he has to succeed in his path of difficult duty to a series of traditions which will exact his greatest efforts.

"Mr. Wicksteed's thorough training, his great ability, his suavity of manner, his unfaltering industry, his reliability never at fault in his fifty-eight years of professional life, upwards of half a century of which was passed in the Legislature, will long preserve his memory in the corridors, where his form will no longer have official recognition; while his return to private life must command the good wishes of all who know him, either by reputation or who have the good fortune to enjoy his friendship."

NEW LAW BOOKS.—Lawyers as well as other workmen must keep themselves supplied with the most approved tools. The Blackstone Publishing Company, of Philadelphia, propose to meet a pressing need of the profession by publishing a series of text books in a manner which must meet with a ready response from the profession. We should advise our reader to send to Messrs. Carswell & Co., their agents in Canada, for circulars on the subject.

CORRESPONDENCE.

FLORENTINE JUSTICE.

To the Editor of the LAW JOURNAL:

Tennyson intimates in "Locksley Hall" that the world has not improved during the last fifty years, and very likely the same author would take the view that there has been no improvement during the last four hundred years. I have lately been perusing the autobiography of Benvenuto Cellini, a worthy Florentine artist who lived about three hundred and fifty years ago, and who seems to have handled the sword as effectively as the chisel.

It seems this worthy was induced to go to France during the reign of Francis I. to execute some marvellous works of art. The king gave him a palace in Paris, with grounds attached, for the purpose of enabling him to live in a becoming state, and at the same time to construct certain statues which were then being made for the adornment of the king's palace at Versailles. It would also seem that some trespassers had squatted on Benvenuto Cellini's premises, and so far as we can judge from his story, in a not very creditable manner. He, however, did not bring ejectment, nor did he avail himself of any legal process to be rid of the intruder, but quickly and quietly expelled him by main force from his premises, and this procedure he carried out in an effective manner, on at least two occasions.

It is perhaps not amiss to permit the old worthy to describe in his own language the calamities that befell him owing to his somewhat rash conduct, and at the same time the very peculiar method he took to punish those who, as he says, perjured themselves in order to maintain a successful action against him. I quote his language, with a few explanatory notes of my own

"Just at this juncture, the second person whom I had driven out of the precincts of my castle, had commenced a lawsuit against me at Paris, affirming that I had robbed him of several of his effects at the time that I dislodged him.

"This suit occasioned me a great deal of trouble, and took up so much of my time, that I was frequently on the point of forming a desperate resolution to quit the kingdom. It is customary in France to make the most of a suit which they commence with a foreigner, or with any other person who is not used to law transactions; as soon as they have any advantage in the process, they find means to sell it to certain persons who make a trade of buying lawsuits. There is another villanous practice which is general with the Normans, I mean that of bearing false witness; so that those who purchase the suit immediately in-

struct five or six of these witnesses, as there happens to be occasion; by such means, if their adversary cannot produce an equal number to contradict and destroy their evidence, and happens to be ignorant of the custom of the country, he is sure to have a decree given against him. Both these accidents having happened to me, I thought the proceedings highly dishonourable. I therefore made my appearance in the great hall of the Palais at Paris in order to plead my own cause, where I saw the king's lieutenant for civil affairs, seated upon a grand tribunal. This man was tall, corpulent, and had a most austere countenance; on one side he was surrounded by a multitude of people; and on the other with numbers of attorneys and counsellors, all ranged in order upon the right and left; others came one by one, and severally opened their causes before the judge. I observed that the counsellors who stood on one side sometimes all spoke together. To my great surprise this extraordinary magistrate, with the true countenance of a Plato, seemed by his attitude to listen now to one, now to another, and constantly answered with the utmost propriety. As I always took great pleasure in seeing and contemplating the efforts of genius, of what nature soever, this appeared to me so wonderful that I would not have missed seeing it for any consideration."

It will be observed that running a lawsuit on speculation is by no means a modern invention, though I think the successful promoter of this suit must have been a lawyer in disguise. However, we find that the victory was not altogether with the successful party, who, it seems, secured judgment, for he details in a very modest (and considering the age), becoming manner the method he adopted to get the better of the person who c aimed the damages, as well as of the person who promoted the suit.

"To return to my suit; I found that when verdicts were given against me, and there was no redress to be expected from the law, I must have resource to a long sword which I had by me, for I was always particular to be provided with good arms. The first that I attacked was the person who commenced that unjust and vexatious suit, and one evening I gave him so many wounds upon the legs and arms, taking care, however, not to kill him, that I deprived him of the use of both his legs.

"I then fell upon the other, who had bought the cause, and treated him in such a manner as quickly caused a stop to be put to the proceedings; for this and every success I returned thanks to the Supreme Being."

It might be supposed from this that actions for assault did not then lie, but it is not unlikely that our hero was befriended by the king.

Benvenuto Cellini some years previously had a difficulty when living in Rome, which resulted in the death of his opponent, and when some friend of the victim demanded his punishment of Clement V., the Pope said: "You do not understand these matters; I must inform you that men who are masters in their profession, like Benvenuto, should not be subject to the laws; but he less than any other, for I am sensible that he was in the right in the whole affair."

The author of *Obiter Dicta* thinks that our ancient friend was as untruthful as Falstaff, but I am glad to find that J. A. Symonds, who has written so much on the subject of Italian Rennaissance, and who must be as capable as any living writer of forming a proper estimate of the characters of the celebrated people of the time, has come to the conclusion that he was on the whole a truthful man.

Yours, AMICUS CURIÆ.

LIMITATION OF ACTIONS.

To the Editor of the LAW JOURNAL:

SIR,—In your last issue I wrote a letter as to the views I entertained in respect to charges upon lands, when the charge itself was aided by a covenant for payment. On a more careful perusal of *Hunter* v. *Nockolds*, I find that this case is not an authority for my view. The case is simply an authority that where a charge is sought to be enforced against lands not in the hands of the grantor of the charge, but six years' arrears of interest can be secured as against the lands. Lord Chancellor Cottenham in his judgment intimated, as an *obiter dictum*, his opinion to be that the result would have been different if the remedy were sought from the grantor, that is if the lands were yet the lands of the grantor, and the reason he gives for this opinion is that cap. 42, 3 & 4 Wm. IV., Imperial Act (in effect cap. 61 R. S. O.,) was passed in the same session, and at a very short interval after 3 & 4 Wm. IV., cap. 27, Imperial Act (in effect 4 Wm. IV., cap. 1 U. C.), and as the first statute permits actions to be brought upon covenants for twenty years after the moneys payable thereunder are due, he thought in order to give effect to both statutes that while the charge against lands was extinguished at the end of six years, still if the plaintiff could invoke a covenant in aid of the debt, he could collect twenty-years' arrears from the grantor. Vice-Chancellor Wigram seemed to think in *Du Vigier* v. *Lee*, 2 Hare 326, that where the charge contained a covenant, the limitation as regards six years' arrears did not apply at all, but *Hunter* v. *Nockolds* overruled this case. The court in *Lewis* v. *Duncombe*, 29 Beav. 175, and *Boyer* v. *Woodman*, L. R. 3 Eq. 313, accepted as law this dictum of Lord Chancellor Cottenham.

In *Sutton* v. *Sutton*, the court refused to recognize *Hunter* v. *Nockolds* as an authority, on the ground that the Imperial Legislature, in passing cap. 57, 37 & 38 Vict., which deals with the limitations of actions as regards charges upon lands and other matters, did not re-enact or refer to cap. 42, 3 & 4 Wm. IV. The court seems to have taken a very common sense ground, that if a charge be extinguished at a certain period a covenant in aid of that charge would be extinguished at the same period, and this very likely would have been the decision of *Hunter* v. *Nockolds* were it not the Lord Chancellor felt himself bound to give some effect to 3 & 4 Wm. IV., cap. 42, section 3. The 37 & 38 Vict. cap. 57, Imperial Act, was very largely enacted in 38 Vict. cap. 16 (cap. 108 R. S. O.), and if *Sutton* v. *Sutton* be held to have been well decided in this Province, and I think it will be eventually so held by our Court of Appeal, then, no doubt, *Allan* v. *McTavish* will be overruled. It may not be amiss to point out that the earliest of our statutes respecting the limitation of charges upon lands is 4 Wm. IV., cap. 1, and the earliest of our statutes respecting limitation of actions upon covenants, etc., is 7 Wm. IV., cap. 3, some three years afterwards, and not as in England, some three weeks after.

Yours, W. H. MCCLIVE.

Law Society of Upper Canada.

OSGOODE HALL.

MICHAELMAS TERM, 1886.

The following gentlemen were called to the Bar, viz.:

November 15th.—Robert Stanly Hays, Wellington Bartley Willoughby, Frederick Stone, Trevussa Herbert Dyre, Franklin Montgomery Gray, Edward Arthur Lancaster, Lorenzo Clarke Raymond, Delos Rogest Davis, John Michael Macnamara, Henry Clay, Eudo Saunders, Archibald McAlpine Taylor, Alexander Fraser.

November 16th.—William James Tremeear, John Robertson Millar, David Alexander Givens, George Francis Burton, Henry Smith Osler, Walter Stephens Herrington, Duncan Ontario Cameron, Osric Leander Lewis, Francis McPhillips, Frederick George McIntosh, Archibald McKechnie, Edward Ellis Wade.

November 20th.—Donald Calvin Hossack.

December 4th.—Herbert Henry Bolton.

The following gentlemen were granted Certificates of Fitness, viz.:

November 15th.—A. M. Denovan, A. M. Taylor, O. L. Lewis, W. B. Willoughby, F. Stone, W. S. Herrington, R. Vanstone, R. F. Sutherland, A. Fraser, S. McKeown, C. B. Jackson, D. H. Cole, R. H. Pringle, A. B. Cameron, E. W. Boyd, F. E. Titus.

November 16th.—A. W. Wilkin, F. M. Gray, G. F. Burton, W. J. Tremeear, D. B. S. Crothers, H. G. Tucker, J. J. Smith.

November 20th.—H. Morrison, H. W. Bucke, F. G. McIntosh, N. J. Clarke, J. R. Shaw.

December 4th.—H. J. Dawson.

The following gentlemen passed the First Intermediate Examination, viz.:

M. H. Ludwig, with honors and first scholarship; J. M. Palmer, with honors and second scholarship; E. H. Britton, with honors and third scholarship; S. A. Henderson, with honors; and Messrs. J. H. Hunter, S. D. Lazier, R. G. Smyth, H. H. Johnston, J. T. McCullough, A. Collins, E. E. A. DuVernet, H. Harvey, J. Irving Poole, G. C. Gunn, W. A. Skeans, R. L. Elliott, R. M. Macdonald, W. Pinkerton, G. D. Heyd, O. Ritchie, W. L. B. Lister, M. C. Bigger, R. L. Gosnell, H. E. McKee, R. O. McCulloch, F. J. Travers, H. F. Errett, M. F. Muir.

The following gentlemen passed the Second Intermediate Examination, viz.:

F. A. Anglin, with honors and first scholarship; W. S. Hall, with honors and second scholarship; J. T. Kirkland, with honors and third scholarship; N. F. Davidson and A. Morphy, with honors; and Messrs. T. Scullard, H. S. W. Livingston, F. P. Henry, R. R. Hall, A. Saunders, F. A. Drake, H. R. Welton, J. M. Quinn, J. Y. Murdoch, A. F. May, W. L. M. Lindsay, D. R. Anderson, T. Browne, R. J. Maclennan, H. B. Smith, W. S. Turnbull, R. K. Orr, T. A. Wardell, H. N. Roberts, A. E. Trow, A. C. Camp, H. M. Cleland, W. W Jones.

The following gentlemen were admitted into the Society as Students-at-Law:

Graduates.—Bidwell Nicholls Davis, Robert Elliott Fair, Lennox Irving, Ralph Johnston Duff, Donald Roderick McLean, James Wilson Morrice.

Matriculants.—Frederick Billings, George Davidson Grant, William Alexander Baird, Henry John Deacon Cooke, Christopher Lucy, Louis Vincent McBrady, John Flemington Tannahill, Robert Talbot Harding, Alexander Robertson Walker, William Henry Williams.

Junior Class.—C. P. Blair, C. F. Maxwell, W. F. Langworthy, J. A. Harvey, G. B. Wilkinson, J. McBride, H. C. McLean, F. R. Blewett, J. B. Pattullo.

Articled Clerks.—T. H. Lloyd, J. Lennox, H. W. Maw.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

Law Society of Upper Canada.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Primary Examination Curriculum for 1887. 1888, 1889 and 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. APRIL 1, 1887. No. 7.

DIARY FOR APRIL.

3. Sun..... *6th Sunday in Lent.*
4. Mon.....C C. term begins. C. C. sittings for trial of non-jury cases begin, except in York.
8. Fri.....*Good Friday.* Holiday H. C. J.
9. Sat..... .County Court term ends. Lord Bacon died, 1626, æt. 66.
10. Sun.....*Easter Sunday.*
11. Mon.....*Easter Monday.* Holiday H. C. J.

TORONTO, APRIL 1, 1887.

THE Government at Ottawa has at length appointed a judge to the position created in 1885 by the 48 Vict. cap. 13. The choice has fallen on Thos. Robertson, Q.C., a leading member of the Hamilton Bar. Mr. Robertson was called to the Bar in 1852 and has for many years enjoyed a good share of business, especially at *nisi prius*, in his own city and the surrounding country. We join with his many friends in wishing him a long and useful career in his new sphere of duty.

PROVINCIAL LEGISLATION — ITS QUALITY AND QUANTITY CONSIDERED.

ERE these remarks are in print, we shall again have the Legislative Assembly of this Province, and soon after the Parliament of the Dominion, busily at work framing laws. The constant devising of amendments to existing laws, or altogether new ones, is considered so necessary a part of the duty of those bodies, that they would probably be thought to have demonstrated that they have no longer any reason for existence, if they should pass a session without a more or less bulky volume of statutes being issued at its close to attest their industry and usefulness.

It may very well be doubted, however, whether the continuous stream of legislation which they pour forth is, after all, such a vital necessity for our well being, or worth the somewhat costly price we pay for it. It has certainly, for some time past, been a work requiring no small amount of time to attempt to keep *au courant* with the statute law of the Dominion and the Province. Before Confederation, the task was not so difficult, as we had then but one legislative machine to watch: now we have two, and by the time a statute has been amended three or four times, as is not infrequently the case, the state of the law upon the particular subject is generally involved in an amount of obscurity, through which the legal profession has to grope with considerable caution.

Whilst repudiating any thought of imputing base motives, it is vain to expect, so long as men are human, that gentlemen who draw several hundreds of dollars a year for their attendance in the halls of Parliament, would ever be able to see that their annual attendance could be safely dispensed with; on the contrary, they would naturally feel that the safety of the constitution would be imperilled, unless for seven or eight weeks in each year they should engage in wordy wars, and give their assent to statutes as to some of which nine-tenths of them know nothing about.

Before long, the idea may force itself upon the people at large, that this mode of annual legislation, compared with the expense which it involves, is a luxury

which a comparatively poor country like this might very reasonably curtail without the slightest injury to the body politic.

It is quite right and proper that the Governments of the Province and of the Dominion should annually render to Parliament an account of their stewardship. It is equally necessary that the representatives of the people should retain a control over the annual expenditure; but we do not think it by any means follows that it is equally necessary that every session should be marked by a fresh batch of statutes.

Let any one take up the statutes of the Province from year to year, and he will see how very few statutes passed in any one session are of such a pressing importance that they could not just as well have been passed a year or two later without any injury whatever to the public by the delay.

In the neighbouring republic this plethora of legislation is also being felt, and in one of the States efforts are already being made to secure biennial sessions of the State Legislature in place of annual sessions; and we think it has already become a matter for serious consideration in this Province, whether a resort to some such expedient is not desirable in order to cut down the present lavish expenditure on legislation.

The present mode of payment of the members of our Legislative Assembly is a direct incentive to them to spin out the session with interminable wrangles about questions upon which the vote of the House is known to be foregone before they are opened. Bills are introduced to make a show of diligence, and a host of them are annually slaughtered in the concluding scene of the session, when the allotted time having been spent, every one is in a hurry to get off and end the farce.

It is not to be wondered at that a system of constantly tinkering statutes is resorted to. The Municipal Act is no sooner consolidated than half a dozen statutes are brought in to amend it in various particulars. That is an Act which every member in the House feels competent to deal with. Other statutes fare almost as badly. As regards questions affecting any other branch of law or the procedure of the courts, nine-tenths of the members might as well be at their farms or behind their counters for all the good they are. Sometimes they may prove a positive evil by rashly foisting crude amendments into carefully drawn measures, thereby rendering them defective or obscure.

We are of opinion that it would be a a great saving of money, and a great improvement in our system of making laws in this Province, if there were a session of the Assembly for general legislative purposes only once in every three years, and that at other times the Assembly should confine itself to passing the public accounts and estimates, and other matters connected with the financial affairs of the Province, and that, in the interval between the legislative sessions, a legislative committee should sit from time to time as might be necessary, for the purpose of carefully considering and devising all such new laws or amendments of existing laws as might be submitted to them, and putting them in such a shape as would in their judgment warrant their passage by the Legislature.

In order to provide for a case where there might be urgent and pressing need for legislation before the ordinary period arrived, it might be ordained that such legislation could take place, provided the legislative committee reported in favour of immediate action.

As to the composition of the legislative committee we have suggested, we think it would be desirable that it should not be confined to members of the House, because

it is undeniable that many persons not members of the House are far better qualified to discharge the duties that would be expected of such a committee than any committee composed exclusively of the members of the House would be. Our opinion is that the committee should partake more of the character of the committee now sitting to revise the statutes; their functions would not be legislative, but purely deliberative, and it would be far more economical to pay the members of such a committee a reasonable sum for their services than to waste it in paying for the annual attendance of a horde of men who do no practical good by their attendance.

The idea of a legislative committee is by no means novel. Fifty years ago, in his answer to the Real Property Commissioners, Mr. James Humphreys, an eminent lawyer of that day, said that he was a great advocate for an institution in the nature of a committee of justice, or some such body to report upon defective justice, and to make periodical revision of the law. The same idea is reiterated by M. Laurent, Professor of the University of Gand, in a preface prefixed to Doutre and Lareau's "Histoire Generale du Droit Canadien." M. Laurent's proposal is that a Council of State should be formed, to which the most distinguished magistrates, advocates and professors should be summoned; that they should deliberate during ten years on all projects for amendment of the law; that they should communicate them to the Superior Courts of Justice, and deliberate anew upon the observations presented by the magistrates; that they should invite public discussion and criticism, and at the end of every ten years present to the legislative body the modifications in the law they deem necessary. He concedes that the Legislature should have the power of amendment; but any amendment, he thinks, should be first submitted to a new discussion by the Council of State before its being finally passed. Were some such system of law-making to prevail, many curious incongruities which we see in statute law might be avoided, and certainly English law, instead of presenting the appearance of a vast system of patchwork, would in time constitute a congruous and harmonious system of jurisprudence.

We have not far to look for defects in the present English method of law making. Only the other day a case came before the Privy Council from South Africa, in which the construction of a statute was involved, which was so worded that if its literal wording had been followed, the whole scope and object of the statute would have been defeated. (See *Salmon* v. *Duncombe*, 11 App. Cas. 627, *ante* p. 45.) Even the English Parliament itself is sometimes found napping. For instance, the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71, s. 4), provides that when a person dies without an heir and intestate in respect of any real estate . . . *whether devised or not devised to trustees by the will of such person*, etc., the law of Escheat shall apply.

To come nearer home, we might take the recent Devolution of Estates Act as an illustration. The Act aims at working a radical change in the law of property. The interests it affects are vast and important. The subject was one fitted to demand the most careful attention, not only with regard to the principle on which the Act is based, but also with regard to its effect on the previously existing law. But so far from the statute bearing evidence of any such broad and comprehensive consideration, it has all the appearance of a "hand to mouth" piece of legislation; a crude attempt to blend two utterly irreconcilable principles of law. In fact this statute reminds us very much of the man at the circus who dazzles the vulgar by essaying to ride two steeds

at the same time. The Legislature has in this Act, planted one foot on the law of personalty and the other on the law of realty, and tried to make both steeds go the same way; but one is an old horse of very cumbersome gait, with all sorts of odd tricks and peculiarities, and the other is a young and skittish thing, all for going ahead, and it will be no wonder if the attempt to go round the ring on two such steeds at the same time should lead to curious results. This was clearly a subject which would have been far better dealt with by a legislative committee, than by the heterogeneous elements of which the House of Assembly is composed.

Another piece of recent legislation, involving important changes, was also one entirely beyond the competence of the Legislature to deal with it intelligently. We refer to the Judicature Act. We remember being present when some of the provisions of that statute were passing through the committee of the whole. About four persons were actually taking any interest in the matter, most of the members were absent, the rest of those present were entirely indifferent, and might just as well, and better for the country, have been in Hong Kong for all the practical use they were. And yet the country was paying the eighty-five gentlemen who took no interest in the matter about $500 a day for their services.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Ont.] [March 1.

BALL v. CROMPTON CORSET CO.

Patent—Infringement of—Mechanical equivalent—Substitution of one material for another.

In a suit for the infringement of a patent, the alleged invention was the substitution, in the manufacture of corsets, of coiled wire springs, arranged in groups and in continuous lengths, for India rubber springs previously so used. The advantage claimed by the substitution was that the metal was more durable, and was free from the inconvenience arising from the use of India rubber caused from the heat from the wearer's body,

Held, affirming the judgment of the Court of Appeal for Ontario, 12 Ont. App. Rep. 738, FOURNIER and HENRY, JJ., dissenting, that this was merely the substitution of one well-known material, metal, for another equally well-known material, India rubber, to produce the same result, on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of India rubber, and it is consequently void of invention, and not the subject of a patent.

Appeal dismissed.

Cassels, Q.C., and *Akers*, for appellants.

Maclennan, Q.C., and *Osler*, Q.C., for respondents.

Ont.] [March 4.

WHITING ET AL. v. HOVEY ET AL.

Company—Directors of—Assignment of property by, for benefit of creditors—Ultra vires—Change of possession—R. S. O. c. 119—Description of property assigned.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of

the creditors of the company is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

Quære.—Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R. S. O. c. 119?

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment,

Held, that if the assignment did come within the terms of the act, its provisions were fully complied with, the deed being duly registered, and there being an actual and continued change of possession as required by section 5. In such deed of assignment the property was decided as, "All the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever or wheresoever, of or to which they are now seized or entitled, or of or to which they may have any estate, right, title or interest of any kind or description with the appurtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock in trade, goods, chattels, right and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, etc."

The schedule annexed specifically designated the real estate, and included the foundry erections and buildings thereon erected, and including all articles such as engines, etc., in or upon said premises.

Held, that this was a sufficient description of the property intended to be conveyed to satisfy sec. 23 of R. S. O., c. 119. *McCall* v. *Wolff* (May 12, 1885, unreported) approved and followed.

Appeal dismissed.

Robinson, Q.C., and *W. M. Hall*, for the appellants.

McMichael, Q.C., *S. H. Blake*, Q.C., and *H. McK. Wilson*, Q.C., for the respondents.

Ont.] [March 14.

SHOOLBRED'S CASE.

Company—Winding up Act—45 Vict. c. 23 (D.) —Appointment of liquidator under—Notice of appointment under sec. 24—Order set aside for want of.

It is a substantial objection to a winding up order appointing a liquidator to the estate of an insolvent company under 45 Vict. cap. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by section 24 of said act, and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.

Per GWYNNE, J., dissenting, that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this court.

Appeal allowed.

Cassels, Q.C., and *Walker* for appellants.

Bain, Q.C. for respondents.

P. Q.] [March 14.

WHEELER ET AL. (Defendants in the Court below), Appellants, and BLACK ET AL. (Plaintiffs in the Court below), Respondents.

Actio confessoria servitutis—Building of barn over alley subject to right of access to drain—Aggravation—Art 557, C.C.

By deed dated August 22, 1843, P. D. sold to one J. B. a certain property in the town of St. John, P.Q., with the right of draining the cellar or cellars of the said property by making and passing a good drain through the lots the said Pierre Dubeau has and possesses . . . and beneath the alley now left open and between the several houses belonging to the said Pierre Dubeau, and the said deed of sale establishing the said servitude was duly registered by a memorial thereof, October 6, 1843.

The respondents having subsequently acquired said property, by their present action against the appellants, owners of the servient land, prayed that the said appellants' property be declared to have been, and to be still, subject to said servitude, and that the appellant

be ordered to demolish a portion of a large barn, constructed by them over said drain, which, they claim, tended to diminish the use of the servitude and to render its exercise more inconvenient. The appellants, on the present appeal, contended that inasmuch as the barn was built on wooden posts there was no solid floor in the barn, and the drain could be raised up and repaired just as well, if not better, as outside of the barn, there was no change of condition of the servient land contrary to law.

Held, affirming the judgment of the court below, that on the evidence the building of the barn in question aggravated the condition of the premises, and therefore that the judgment of the court below ordering the appellants to demolish a portion of their barn covering the said drain in order to allow the respondents to repair the drain as easily as they might have done in 1843 when said drain was not covered, and to pay $50 damages, should be affirmed.

GWYNNE, J., was of opinion that all appellants were entitled to was a declaration of right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion may require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature.

Appeal dismissed with costs.

Robertson, Q.C. for appellants.

Geoffrion, for respondents.

P. Q.] [March 14.

L'ASSOCIATION PHARMACEUTIQUE DE LA PROVINCE DE QUEBEC v. WILFRED E. BRUNET.

Quebec Pharmacy Act, 48 Vict. (Q.) ch. 36 s. 8—Construction of—Partnership contrary to law—Mandamus.

Held, affirming the judgment of the court below, that section 8 of 48 Vic. ch. 36 (Q.), which says that all persons who, during five years before the coming into force of the Act, were practising as chemists and druggists in partnership with any other person so practising are entitled to be registered as licentiates of pharmacy, applies to respondent, who had, during more than five years before the coming into force of the said act, practised as chemist and druggist in partnership with his brother and in his brother's name, and therefore he (respondent) was entitled under section 8 to be registered as licentiate of a pharmacy.

Appeal dismissed with costs.

Archambault, for appellants.

Geoffrion, for respondent.

P. Q.] [March 14.

PARISH OF ST. CESAIRE v. MACFARLANE.

Municipal debentures—Future conditions—Municipal code, art. 982.

Held, that a debenture being a negotiable instrument, a railway company that has complied with all the conditions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debentures. free from any declaration on their face of conditions mentioned in the by-law to be performed in future, such as the future keeping up of the road, etc., art. 982, Municipal Code, FOURNIER, J., dissenting.

Appeal dismissed with costs.

Geoffrion, for appellants.

O'Halloran, Q.C. for respondent.

P. E. I.] [March 14.

SHERREN v. PEARSON.

Statute of Limitations—Title to land—Possession for twenty years—Isolated acts of trespass—Not sufficient to oust owner.

In an action of ejectment the defence was that the land in question was a part of the defendant's lot, and, if not, that the defendant had had possession of it for over twenty years, and the plaintiff's title was consequently barred by the Statute of Limitations. In support of the latter contention evidence was given of cutting lumber by the defendant and those through whom he claimed on the land, but these alleged acts of possession only extended back some seventeen years, with one exception, which was that of an uncle of the

defendant who swore that he had cut every year for thirty-five years. The defendant, however, swore that this uncle had nothing to do with the land. The jury found for the plaintiff.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, that these acts of cutting lumber were nothing more than isolated acts of trespass on wilderness land, which could not effect an ouster of the true owner, and give the defendants a title under the Statute of Limitations.

Appeal dismissed.

Hodgson, Q.C., for the appellants.

Davies, Q.C., for the respondents.

[March 14

FAIRBANKS ET AL. (Plaintiffs), Appellants, v. BARLOW ET AL. (Defendants), and O'HALLORAN (Intervenant), Respondents.

Pledge without delivery—Possession—Rights of creditors.

B., who was the principal owner of the South-Eastern Railway Company, was in the habit of mingling the moneys of the company with his own. He bought locomotives which were delivered to and used openly and publicly by the railway company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*, sold ten of these locomotive engines to F. *et al.*, the appellants, to guarantee them against an endorsement of his notes for $50,000. B. having become insolvent, F. *et al.*, by their action directed against B., the South Eastern Railway Company, and R. *et al.*, trustees of the company under 43 & 44 Vict. ch. 49, Q.C., asked for the delivery of the locomotives, which were at the time in the open possession of S.-E. Ry. Co., unless the defendants pay the amount of their debt. B. did not plead. The S.-E. Ry. Co. and R. *et al.*, as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B. notoriously insolvent at the time of making the agreement.

Held, affirming the judgments of the courts below, that as the transaction with B. only amounted to a pledge not accompanied by delivery, F. *et al.*, the appellants, were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent. The action was therefore rightly dismissed and intervention maintained.

Appeal dismissed with costs.

Church, Q.C., and *Nicolls*, for appellants.

O'Halloran, Q.C., for respondents.

COURT OF APPEAL.

Co. Ct. Carleton.]

SEABROOK v. YOUNG.

Pleading—Trespass—Title to land.

Under the system of pleading in the High Court and in County Courts under the Judicature Act, Rules 128, 146, 147, 148, 240, where a material fact is alleged in a pleading, and the pleading of the opposite party is silent with respect thereto, the fact must be considered as in issue. And where in an action of trespass for pulling down fences and for mesne profits the plaintiff alleged his title at the time from which he claimed to recover the mesne profits: and the defendant, in his statement of defence, denied that he committed any of the wrongs in the plaintiff's statement of claim mentioned, and denied that he was liable in damages or otherwise on the alleged causes of action.

Held, that on these pleadings the title to land was expressly brought in question, and the jurisdiction of the County Court thus ousted. The defendant was not estopped from raising the question of jurisdiction at the trial, because of his omission to file an affidavit under R. S. O. c. 43, s. 28, that his pleading was not pleaded vexatiously, nor for the mere purpose of excluding jurisdiction; such an omission was a mere irregularity for which the plea might have been set aside, but it could not operate to confer jurisdiction where the plea raised the question of title.

The statement of claim presented a cause of action within the jurisdiction, and the defendant could not have demurred; it depended

upon his pleading whether the jurisdiction would be ousted, and therefore Rule 189 did not apply to prevent the raising of the question of jurisdiction at the trial. It was contended that the defendant was estopped from disputing the plaintiff's title by his admissions and by reason of the plaintiff having recovered a judgment in ejectment against the defendant's tenants; but the plaintiff's claim was for damages for pulling down fences and for mesne profits for a period of five or six months prior to the date of the ejectment, and the admissions of title did not go further back than the ejectment.

Held, that the judgment against his tenants was evidence against the defendant, but that the title was really in question, and necessary to be proved in respect of the period for which mesne profits were claimed prior to the ejectment.

Co. Ct. Carleton.]

HOUSTON v. MCLAREN.

A lease from the defendant to the plaintiff under the Short Forms Act contained the usual covenant by the plaintiff, the lessee, to keep up fences, but the defendant, the lessor, undertook and agreed "to build the line fence between the premises hereby demised and the farm of D. M., should the same be required during the currency of the lease."

It appeared by the evidence that there was no line fence between the farms, but that there was a fence upon D. M.'s land about twenty-four yards south of the boundary line. The plaintiff alleged that this fence was out of repair, that the defendant would not mend it, and that in consequence damage had been done to his crops by cattle, and he contended that the condition "required during the currency of the lease" was fulfilled by the fence on D. M.'s land being out of repair.

Held, affirming the judgment of the court below, that no liability could accrue under the defendant's covenant until something occurred to disturb the state of things existing at the time the lease was made, and that the covenant was designed to meet such a contingency as D. M. refusing to allow entry on his land to repair the fence or requiring the line fence to be built.

Semble, per HAGARTY, C.J.O.—That the plaintiff's covenant to keep up fences applied to all then existing fences used for the protection of the farm, and would be properly applicable to the fence on D. M.'s land so long as it remained as it then was; but

Per BURTON and PATTERSON, JJ.A.—The plaintiff's covenant would only extend to fences on the demised premises.

C. P. Div.]

SCOTT v. CRERAR.

Libel—Evidence.

On the trial of an action for a libel contained in an anonymous letter circulated among members of the legal profession in the city of H., charging the plaintiff with unprofessional conduct, no direct evidence was given to shew that the defendant was the author of the letter, but the plaintiff relied upon several circumstances pointing to that conclusion. The judge at the trial refused to admit some of the evidence tendered.

Held, reversing the judgment of the Common Pleas Division, 11 O. R. 541, that evidence of the defendant being in the habit of using certain unusual expressions which also occurred in the letter, was improperly rejected; but

Semble, a witness could not be asked his opinion as to the authorship of the letter; and

Per BURTON, J.A.—Evidence of literary style on which to found a comparison, if admissible at all, is not so otherwise than as expert evidence.

Q. B. Div.] [March 15.

KNIGHT v. MEDORA.

Division Courts—Prohibition—Jurisdiction.

The judgment of the Q. B. D. 11 O.R. 138, refusing to order prohibition to a Division Court, was affirmed on appeal on the ground that the title to land was not brought in question; but

Held, per PATTERSON and OSLER, H. A. (disagreeing with the court below, and affirming *Mead* v. *Creary*, 8 P. R. 374, 32 C. P. 1), that the notice under 48 Vict. c. 14, s. 1, amending 43 Vict. c. 8, s. 14, disputing the jurisdiction, is

only required when a suit otherwise of the proper competence of the Divisional Court has been brought in the wrong Division, and the want of such notice cannot give the Divisional Court jurisdiction if the title to land is brought in question.

MILLER v. CONFEDERATION.

The refusal of the court below to order a new trial by reason of disagreement of the judges (11 O. R. 120) was affirmed.

HAGARTY, C.J.O., *hesitante* as to granting a new trial, on the ground of the discovery of fresh evidence.

GRAY v DUNDAS.

The judgment in the court below, reported 11 O. R. 317, was unanimously affirmed by this court, and the appeal therefrom dismissed with costs.

KNIGHT v. MEDORA.

The judgment of the Q. B. D., reported 11 O. R. 138, was, on appeal to the court, unanimously affirmed, and the appeal therefrom dismissed with costs.

From Boyd, C.]

MITCHELL v. GORMLEY.

Partnership—Sale by partner of undivided share.

The plaintiff and defendant jointly purchased land with the object of selling it again at a profit, the plaintiff having an undivided one-third interest, and the defendant the remaining two-thirds.

The defendant formed a syndicate of eight persons, of whom he himself was one, to which he turned over his two-thirds interest at a profit. There was no agreement between plaintiff and defendant restraining either from disposing of his share.

Held, affirming the judgment of BOYD, C., that assuming the plaintiff and defendant to have been partners as dealers in real estate bought on speculation to be sold at a profit, no part of the partnership property had been alienated or taken from the purposes of the partnership; and, therefore, the plaintiff was not entitled to participate in the profit made by the defendant on the sale of his undivided share.

DICKEY v. MCCAUL.

Sale of goods—Conversion.

The defendant could not be held liable for a conversion of the goods in question by reason of his having joined in a bill of sale of them, and having accepted and assigned a mortgage for the balance of the purchase money thereof, no other act of interference with them on his part being shown, they never having been in his possession or control, and he never having had the power to deliver up or retain them, so as to make a demand upon him and refusal by him evidence of conversion, he having acted in the sale of the goods only as the agent and by the authority of another.

The plaintiff, J. I. D., could not maintain an action for the conversion of the property in question; for, assuming that it was the property of those under whom he claimed, which was one of the matters in controversy, it did not become vested in him till after the alleged conversion. Nor could the plaintiff, J. D., maintain the action, he never having had the actual possession of the property, but a mere right as receiver appointed by the court to obtain the custody of it, if it belonged to those whom he represented, which would not support the action, though it might form the ground of a special application to the court for a mandamus, or attachment, or other appropriate relief.

QUEEN'S BENCH DIVISION.

Full Court.]

MURPHY v. CITY OF OTTAWA AND DOYLE.

Municipal corporation—Contract in writing for construction of sewer—Contractor and sub-contractor—Master and servant—Interference by corporation through inspector—Joint wrong doers—Liability—Compensation.

The corporation of the city of Ottawa contracted with defendant, Doyle, by agreement in writing to lay down sewer pipes on certain streets in the city of Ottawa, and by their inspector the corporation exercised superintendence over the work as it progressed.

Doyle employed one McCallum to engage workmen and oversee the work. McCallum engaged Murphy, the husband of the plaintiff.

During the progress of the work the sides of the sewer caved in through the faulty and negligent shoring of the walls of the sewer, thereby causing the death of Murphy.

Held, that under the evidence the corporation were not liable; that no recovery ought to have been had against either of the defendants, as there was no evidence from which it could have been reasonably inferred that the deceased was ignorant of the dangerous character of the work he was engaged in, and that he had quite as much knowledge and means of knowledge of its dangerous character as his master, and with such knowledge voluntarily engaged in it. But as defendant Doyle had not moved against the verdict found against him it was therefore allowed to stand.

Held, also, that the corporation by their inspector had not so interfered with the conduct of the work by the deceased as to assume personal control over the deceased within the opinion of Gifford, L.J., in *Stephens* v. *Police Commissioners*, 3 Court of Sessions Cases, 535.

Held, also, that the action, being founded on the relationship of master and servant, both defendants could not be held liable, and that the plaintiff, by retaining her judgment against Doyle, had elected to treat the wrongful act or omission as his, and could therefore have no recourse against the corporation.

McCarthy, Q.C., for motion.

Lount, Q.C., and *Marsh*, contra.

DUNKIN v. COCKBURN.

Timber limits—Rights of licensees—Free grants.

Owners of timber limits have no right by statute or order in council after the issue of patent to haul their timber or logs over the uncleared portion of any land not covered by their timber license and originally located as a free grant.

Kerr, Q.C., and *Paterson*, for motion.

McCarthy, Q.C., and *Falconbridge*, Q.C., contra.

STRATTON v. CITY OF TORONTO.

In an action for damages for injury caused by negligent driving, it appeared that a servant of the defendants, on his way for a wrench for which he had been sent for the purpose of shutting off the water from a street hydrant which had burst, without the knowledge or consent of the defendants, wrongfully took possession of a horse and buggy belonging to the defendants' City Commissioner, and therewith caused the injury complained of.

Held, that the defendants were not liable.

F. Wright, for plaintiff.

McWilliams, contra.

THE QUEEN v. YOUNG.

Canada Temperance Act—Police magistrate.

Defendant was convicted at the town of Perth by and before the police magistrate for the south riding of the county of Lanark for selling, in the said town of Perth, intoxicating liquor, contrary to the Canada Temperance Act, 1878.

The authority of the police magistrate was derived from a commission appointing him police magistrate for the south riding of the county of Lanark, as constituted for the purposes of representation in the Legislative Assembly of Ontario.

The same magistrate had been a few weeks previously, by a separate commission, appointed police magistrate for the north riding

of the said county of Lanark; and the said north and south ridings together comprised the whole of the territorial limits of the county of Lanark as constituted for municipal purposes and no more.

The town of Perth was situate wholly within the said south riding.

Held, that the said magistrate was not a police magistrate for the county of Lanark within the meaning of the 103rd section of the Canada Temperance Act, 1878; and that Lanark was not a county having a police magistrate within the meaning of the said section.

Held, further (ARMOUR, J., on this point dissenting), that the said police magistrate was not a police magistrate for the town of Perth within the meaning of the said section; and that Perth could not, in virtue of the said commission appointing a police magistrate for the south riding of the county, be held a town having a police magistrate.

Per ARMOUR, J.—Perth was, under the circumstances, a town having a police magistrate, and the said police magistrate had, therefore, in this case, jurisdiction to convict.

Johnston, for the Crown.

Aylesworth, contra.

Rose, J.]

SIMPSON v. CORPORATION OF VILLAGE OF HUNTSVILLE.

Municipal corporation — Negligence — Accident occurring prior to organization of municipality —49 Vict. ch. 55—Non-liability—Pleading.

To an action by plaintiff against defendants for an accident to plaintiff on 11th April, 1886, caused by slipping on a sidewalk of defendants covered with snow and ice, negligently allowed to accumulate thereon by defendants, and being otherwise defective and negligently out of repair for a long time to the defendants' knowledge, and which it was their duty to keep in repair, defendants pleaded that the village of H. had not at the date of the accident been organized according to the terms of 49 Vict. c. 55, incorporating said village, and could not have any officers or servants, and could not be and was not guilty of negligence by reason of anything done or omitted previous to or at the said date of said alleged accident.

Held, on demurrer, a good defence.

Patterson, for demurrer.

Arnoldi, contra.

Full Court.]

RE MACDOUGALL.

Solicitor—Annual certificates.

A solicitor who allows his name to be used as a member of a firm of solicitors in proceedings before the courts, although not a partner in regard to profits of the firm, is a practising solicitor within the meaning of R. S. O. cap. 140.

M., a solicitor of the court, allowed his name to be used by the firm of M. M. & B. in the usual advertisements and business cards of the firm. Proceedings in the courts were carried on by the firm of M. M. & B. M. did not participate in the profits of the firm.

Held, notwithstanding this, that he was liable to be suspended for practising without having taken out an annual certificate from the Law Society.

ARMOUR, J., dissenting.

Reeve, Q.C., and *W. Read*, for the motion.

F. Macdougall, contra.

REGINA v. PIERCE.

Criminal law—Conviction for bigamy.

The prisoner was convicted under 32 & 33 Vict. c. 20, s. 58, of bigamy. The first marriage was contracted in T., the second in D., in the U. S. of America.

Held, that it was incumbent on the Crown to charge and prove that the prisoner, at the time of the commission of the offence, was a subject of Her Majesty, resident in Canada, and that he had left the same with intent to commit the offence.

The learned judge directed the jury that if the prisoner was married to his first wife in Toronto, and to the second in Detroit, they should find him guilty of bigamy.

Per WILSON, C.J.—The indictment did not sufficiently charge the offence; and

Quære, whether the trial should not have been declared a nullity.

The learned judge withdrew from the jury the question of "leaving with intent."

Held, a misdirection.

Johnston, for the Crown.

Bigelow, contra.

McMULLEN v. POLLEY.

Mortgagor and mortgagee—Authority of solicitor acting for both to receive mortgage money.

M. applied to one McM., a solicitor, for a loan of $6,200 on his land. McM. got one P. to advance the money. He then drew the mortgage, which was executed by M. and wife, and left with him until P. came to pay the money. P. subsequently called on McM., and upon his registering and delivering over the mortgage paid him the money. McM. after this told M., on his calling on 6th March, that P. had not been able as yet to get the money. On M. stating that he needed $400 at once McM. gave him his own cheque for that sum. M. swore that this was as a loan, and was subsequently repaid. On the 2nd April McM. absconded without having accounted for the $6,200. After he left, two receipts were found among his papers, signed by M. and dated 6th March, for $400 and $8,936, as money received from McM. on account of the P. mortgage, and a memo., from which it appeared that $205.55 had been paid out of the mortgage money by McM. to discharge execution debts of M.'s which he had instructed McM. to settle.

Held, that it must be shown that either express or implied authority was given McM. by M. to receive the money to justify P. in paying it to him; that his possession of the mortgage with an indorsed receipt did not give such authority, but that there was evidence of authority to receive to his own use out of the mortgage money when paid the above three sums, sufficient to entitle P. to hold the mortgage as a security to that extent.

Britton, Q.C., for motion.

Walkem, Q.C., contra.

CLARKSON v. TORONTO STOCK EXCHANGE.

Stock Exchange.

F. and L., brokers, in partnership, were each members of the Toronto Stock Exchange, being each the owner of one seat at the Board. They assigned to the plaintiff for the general benefit of creditors in December, 1884. The Toronto Stock Exchange, by their by-laws, provide that in case of a member becoming insolvent and not procuring a release from his creditors within a named period, the Exchange shall have power to realize the seats by sale, and the proceeds in such case are to be applied first, in payment of fines and dues to the Exchange, secondly, in payment of claims arising out of Stock Exchange transactions of creditors being members of the Exchange, and thirdly, the balance, if any, to be paid to the insolvent or his legal representative. The seats of F. and L. were sold under the by-laws of the Exchange, and the proceeds remained in the hands of the Exchange. Certain members of the Toronto Stock Exchange claiming to be creditors of F. and L. prior to their insolvency for debts arising out of Stock Exchange transactions, filed claims under the by-laws prior to the sale of the seats. The plaintiff, on the other hand, claimed to be entitled to the seats and to the moneys arising from their sale under the assignment to him for the benefit of creditors. All parties concurred in the sale of the seats subject to their respective rights. This action is brought by the plaintiff as assignee, for the benefit of creditors of F. and L. against the Toronto Stock Exchange for payment to him of the moneys realized from the sale of the seats.

Held, first, that it was competent to the Toronto Stock Exchange to pass the by-laws in question, giving the preference to the claims of the Exchange, and to claims of members of the Exchange for debts arising out of Stock Exchange transactions; secondly, that the plaintiff is the legal representative of the insolvents and entitled to the payment to him of the balance of the moneys arising from the sale of the said seats after payment of fines and fees due to the Exchange and claims of creditors, members of the Exchange, arising out of Stock Exchange transactions; and thirdly, that the by-laws of the Exchange do

not provide any means for ascertaining or deciding any contest as to what deductions may properly be made from the proceeds of sale of the said seats, and that it is proper to refer this matter for enquiry to the Master.

Arnoldi, for motion.

Ritchie, Q.C., contra.

JORDAN v. DUNN.

Will — Construction — Conditions precedent and subsequent — Validity of.

Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions:

First, that he abstain totally from intoxicating liquors and card playing; secondly, that he be kind and obedient to his mother; thirdly, that he be known among his friends as an industrious man ten years after the death of his mother.

Held, (1) that the three conditions were conditions precedent up to the time of the mother's death, and that conditions one and three were conditions subsequent for ten years after the mother's death.

(2) That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition.

(3) That the first condition was not valid, and was too vague or indefinite for trial or adjudication by the court; and having been broken, the son's title failed in so far as the condition was precedent, and was forfeited in so far as the condition was subsequent.

Semble, That conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the court.

Lash, Q.C., and *R. Cassels*, for motion.

Osler, Q.C., contra.

CHANCERY DIVISION.

Full Court.] [March 5.

REGINA v. FEE.

Canada Temperance Act, 1878, *s.* 123—*Defendant compellable to answer—Criminating questions—Jurisdiction of Divisional Court.*

This was a conviction under the Canada Temperance Act, 1878, whereby the plaintiff was adjudged to pay a fine for selling liquor unlawfully. Being brought up on *certiorari* before FERGUSON, J., sitting in court, it was quashed (no cause being shewn, and no one appearing to support the conviction) on the ground that the defendant had been obliged to give evidence of his own criminality. After the order to quash had been issued an application was made on the part of the Crown to open up the matter on the ground that instructions had been given to shew cause, but that through inadvertence default had happened. The judge was disposed to accede to the application (if there was jurisdiction to do so), and, with a view of having the whole matters in controversy investigated, sent the application to be disposed of by the Divisional Court.

Held, (1) That the right of rehearing which existed in matters of a criminal nature such as the present, before the Judicature Act, is not interfered with by that Act, and applied to the present case, and if there was jurisdiction to apply to a single judge to quash the conviction, there was jurisdiction in the Full Court to reconsider his decision.

(2) On the proper construction of the Canada Temperance Act, 1878, s. 123, a defendant is compellable when called as a witness to answer questions, even though tending to criminate himself.

Order quashing the conviction reversed. No costs.

T. D. Delamere, for the Crown.

A. H. Marsh, for the Defendant.

Full Court.] [March 5.

HOLMES v. MURRAY.

Will—Devise—Republication of will by codicil—Mortmain—R. S. O. c. 216—38 Vict. c. 75 O.

Judgment herein, noted *supra* 418, reversed, and the devise to the charity held to be good.

Per BOYD, C.—Though by the statute now in force the will is to speak from the death of the testator, unless a contrary intention be expressed, that does not change the date when the will was made, which is the sole point under the statutes which validate these bequests to religious bodies. The codicils do not revoke, but confirm the charitable disposition of the testator shewn at the time he made the will, but the source of the bounty does not spring from the last codicil but from the original will.

PROUDFOOT, J.—There is no doubt that for some purposes the will is drawn down to the time of republication or confirmation, as for instance, under the old law, to let in after acquired property. But in cases affecting real estate it has been held that if the will be made before the Statute of Charitable Trusts, and confirmed afterwards, or made more than six months before the death of the testator and confirmed afterwards, that the devise is good; and these decisions govern the present, and the devise to the charity is good.

McKay, for the plaintiffs, the trustees.

Maclennan, Q.C., for the appellants.

Full Court.] [March 5.

HATTON v. BERTRAM.

Will—Construction—Passing of after acquired property.

Judgment, noted *ante* p. 92, affirmed with costs.

Per BOYD, C.—The word "now" in the devise of Walkerfield, which I now reside upon," should not be allowed to control the other parts of the will, and is not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death. The after acquired property in connection with Walkerfield was intended to pass by the will to the trustees, and by the will they were to hold "Walkerfield" for the use and benefit of the testator's daughter.

Moss, Q.C., for the plaintiffs.

Lash, Q.C., and *E. D. Hall*, for the adult defendants.

Maclennan, Q.C., for the infant defendants.

Ferguson, J.] [March 10.

RE MURRAY AND KERR.

Vendor and purchaser—Representation of rents in advertisement—Compensation—Heating—Taxes.

K. purchased certain property at auction which had been advertised. Among the representations made in the advertisement was one that it "at present rents for $11.60." After the sale the purchaser applied for compensation on two grounds: (1) that the landlord was bound to heat the building for the tenants, and the cost of which was not included in the $11.60; and (2) on the ground that the $11.60 did not include the taxes.

Held, that he was entitled to compensation on both grounds, and a reference was ordered to ascertain the amounts.

E. T. English, for the vendor.

Hoyles, for the purchaser.

Ferguson, J.] [March 16.

RE HAGUE, TRADERS' BANK v. MURRAY.

Judgment against executor—Conclusiveness of—Notice of dishonour.

The Traders' Bank and Central Bank in September, 1886, obtained judgments against T. M., the executor of W. H., deceased, upon certain promissory notes endorsed by W. H., which fell due after his death and were dishonoured. In December, 1886, the Traders' Bank obtained an administration order for the administration of the estate of W. H., and in the course of proceedings in the Master's office the two banks brought in their judgments as proof of their claims against the estate.

Thereupon the other creditors, by the solicitor appointed to represent them, asked leave to go into evidence to show that when the said promissory notes fell due and were

dishonoured, no proper notice of dishonour was given to T.M.

The Master ruled that the judgments were only *prima facie* evidence against the other creditors, and gave them leave to go into evidence as desired.

The banks appealed.

Held, the judgments were conclusive evidence as against the other creditors of the existence of the debt and the relation of debtor and creditor, though *semble* they would be only *prima facie* evidence against heirs and devisees.

S. H. Blake, Q.C., and *Lefroy*, for the appeal.

J. Reeve, contra.

PRACTICE.

Master in Chambers.] [April 13, 1886.

LEVY V. DAVIES.

Interpleader—Sale of goods under order—Levy of money under execution—Creditors' Relief Act, 1880—Costs.

A sheriff had seized goods under writs of *fi. fa.* in his hands, when the goods were claimed by a chattel mortgage. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into Court, which was done. After the claim of the chattel mortgagee had been barred a question arose as to the distribution of the money in court.

Held, that the seizure under the writs, together with the conversion into money by the sheriff under the order of the court, and the final barring of the claim of the chattel mortgagee, constituted a levying of the money under the writs by the sheriff in the sense of sec. 5 of the Creditors Relief Act, 1880, and therefore that the money in court should be distributed rateably according to the provisions of that Act; but

Held, also, upon a construction of s. 35 of the Act, that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to add their costs of the interpleader to their claims if they did not recover them from the claimant.

Kappelle, for the sheriff and one execution creditor.

Watson, *Holman*, *Aylesworth*, *Clement*, *George Bell*, *John Greer* and *Wickham*, for the other execution creditors.

P. McPhillips, for the claimant.

C. P. Div. Ct.] [June 26, 1886.
Rose, J.] [March 1, 1887.

MACGREGOR V. MCDONALD.

Discovery—Affidavit of documents—Evidence on motion for better affidavit—Inspection of documents—Rule 234.

The plaintiff sought to compel the defendant, F. McD., to file a better affidavit of documents, and relied upon the affidavit of documents of a co-defendant, D. M. McD., and also upon an affidavit of F. McD., filed upon an interlocutory motion in the action, as shewing that she had in her possession a power of attorney and statements of account which were not set out or in any way alluded to in her affidavit of documents, wherein she stated that the documents set out were the only ones in her possession relating to the action. In the affidavit in the interlocutory motion F. McD. admitted that she had received the power of attorney and statements of account in question from D. M. McD., but not that she had them at the time of making her affidavit of documents.

Held, reversing the order of WILSON, C.J., in Chambers, that the affidavit of D. M. McD. could not be received to contradict the affidavit of documents of F. McD., and that her admissions relied upon were not sufficiently explicit, for it was not to be inferred in the face of her affidavit of documents that at the time of making it she still had the documents which were at one time received by her; and,

Per ROSE, J., upon a subsequent motion, the court having refused to order a better affidavit of documents, an application under Rule 234, made upon the same material for inspection of the documents in question on the former application, could not succeed.

MacGregor, for the plaintiff.

S. H. Blake, Q.C., and *Holman*, for the defendant, F. McD.

Rose, J.] [February 25.

SCOTT v. TOWN OF LISTOWEL.

LIVINGSTON v. TOWN OF LISTOWEL.

Assessment—Appeal—Service of notice—Fine—R. S. O. ch. 180, secs. 56, 59.

R. S. O. ch. 180, sec. 59, regulating appeals to the county judge from the Court of Revision as to the assessment of property, provides (sub-sec. 2) that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the Act for closing the Court of Revision a written notice of his intention to appeal (sub-sec. 3); that the judge shall notify the clerk of the day he appoints for hearing appeals; and (sub-sec. 4) that the clerk shall thereupon give notice to all the parties appealed against. Sec. 56, sub-sec. 19, provides that all the duties of the Court of Revision shall be completed, and the rolls finally revised, before the 1st day of July in each year.

The Court of Revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the Court of Revision sat until the 5th July; on the 15th July the clerk notified the judge that notice had been given of these appeals; and on the 16th July the judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties.

Held, that the limitation in sec. 59, sub-sec. 2, should be construed to mean that notice of appeal should not be served after the expiration of five days from the closing of the Court of Revision; and also that the service in this case was within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him; and further, that service prior to the expiry of the five days was good service.

Shepley, for the plaintiffs.

W. H. P. Clement, for the defendants.

Ferguson, J.] [March 10.

VANDERVOORT v. YOUKER.

Demurrer—Averment of malice—Inferred malice—Reasonable and probable cause of belief of larger amount due.

Y. issued a capias before judgment against V., and had him arrested. After the arrest V. tendered $90 in full of Y.'s claim, which was refused as not being sufficient. Y. then proceeded with his action, but failed to obtain a judgment for more than $90.

In an action by V. against Y., in which no malice was alleged, but claiming damages for wrongful arrest.

Held, on demurrer, that malice would not be inferred, because, so far as appeared from the pleadings, Y. had reasonable and probable cause for thinking that V. owed him more than $90, and as malice was not alleged the demurrer must be allowed with costs; leave to amend given.

Aylesworth, for the demurrer.

Lash, Q.C., contra.

C. P. Div. Ct.] [March 12.

BETTS v. GRAND TRUNK RY. CO.

Discovery—Production of documents—Railway accident—Report and evidence on investigation.

The plaintiff, in an action for damages for injuries sustained in a railway accident, sought to compel the defendants to produce a certain report of an investigation held by the defendants immediately after the accident, and the notes of evidence taken at the investigation. These documents, according to the evidence of H., an officer of the defendants, who was examined for discovery in the action, were not obtained for the solicitor of the defendants, nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced, but "for the purpose of the management of the line;" "for our own purposes; it was not intended for a purpose of this kind" (*i.e.*, for use in legal proceedings). In answer to the question whether the defendants' solicitor was present at the investigation, H. said, "No; it would be entirely between the officers of the company." The affidavit of the

solicitor stated that the information was obtained that he might advise the defendants as to their liability for damages arising from the accident, and that it had been used for such purpose and no other. The defendants' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts, and that these documents were in the possession of the defendants.

Held, that the court need not, under these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out and privilege claimed for them; and that upon the statements of H. and the solicitor the documents were not privileged and should be produced.

Wheeler v. *Le Marchant*, 17 Ch. D. 675, and *Westinghouse* v. *Midland Ry. Co.*, 48 L. T. N. S. 462, followed.

Aylesworth, for the defendants.

Shepley, for plaintiff.

C. P. Div. Ct.] [March 12.

DOBIE v. LEMON.

Judgment by default—Setting aside—Security—Disposal of property—Interest.

The plaintiff claimed $923.13, the balance of an account, and interest thereon, and signed judgment for default of an appearance upon the special indorsement of his writ of summons for $1,253.

The defendant moved to set aside the judgment, swearing that he had failed to enter an appearance owing to a misapprehension, denying positively that he owed the plaintiff anything, and alleging that he at one time owed him $250, but that it had been satisfied by the plaintiff taking one A. as his debtor instead of the defendant, and further, that if the debt had not been satisfied by A. it was barred by the Statute of Limitations. No affidavit was filed on behalf of the plaintiff verifying the debt, and the arrangement as to substituting A. was not denied. A local judge set aside the judgment, but only on the terms that the defendant should give security for or pay into court the sum of $250.

Held, that if upon an application by the plaintiff, under Rule 80 or Rule 324, for leave to enter judgment, such a defence had been sworn to, and such circumstances had appeared, the application would not have been granted, and payment into court of security would not have been exacted from the defendant as a condition of his being allowed to defend; there is no substantial difference between the case where a party seeks the right to defend before judgment signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case, giving him the right to defend; and therefore terms should not have been imposed upon the defendant. The disposal by the defendant of his property liable to execution since the service of the writ of summons upon him was not a matter to disentitle him to relief that otherwise could not properly have been denied him.

Reumachs v. *Mesquita*, 1 Q. B. D. 418, followed.

Semble, if the defendant's statements were true the plaintiff would not have been entitled to interest on the amount of his claim, and the judgment would have been irregular.

Aylesworth, for the plaintiff.

C. J. Holman, for the defendant.

Boyd, C.] [March 14.

FRASER ET AL. v. JOHNSTON ET AL.

Jury notice—Equitable claims—Demurrer.

Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendant asked for rectification of the contract, a jury notice was struck out.

Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury.

Bingham v. *Warner*, 10 P. R. 621, commented on.

Hoyles, for defendants.

Holman, for plaintiffs.

CORRESPONDENCE.

TAXING OFFICERS.

To the Editor of the LAW JOURNAL:

DEAR SIR,—I take the liberty, as an old subscriber to the LAW JOURNAL, to enclose you a "plaintive petition" in rhyme to those unfeeling gentry, the taxing-masters. Vigorous prose has hitherto failed to melt them in their ruthless butchering of our bills. Tney forget that they are not alone in the butcher business, and that in equity at least there should be a "mutual remedy." Let them paste this rhyming plaint in the crowns of their hats until, at least, the N. P. protects the manufacturers of costs like the manufacturers of cottons.

IN RE BUTCHER.

A p'aintive petition to Taxing Officers generally by every solicitor with a young and g owing family.

Thou who cents and dollars after
Cents and dollars lop'st away,
Often with unfeeling laughter,
From the bills that clients pay.
Faster goes the cash and faster,
Our insides with meat to fill;
Taxing Master, Taxing Master,
Tax, oh tax, my butcher's bill!

Oh! the price that beef and mutton
Cost me for my humble board!
Butchers never care a button
Veal that we can scarce afford.
When we lay it on like plaster,
Thou dost take the thick off still;
Taxing Master, Taxing Master,
Tax, oh tax, my butcher's bill!

Fish with meat hath risen in measure,
Poultry out of reach far fly;
Game is a forbidden pleasure,
Being e'en more than ever high.
Dearth of food 's a dire disaster,
Would thou could'st avert that ill;
Taxing Master, Taxing Master,
Tax, oh tax, my butcher's bill.

Berlin. JOHANN.

[Our plaintive friend forgets that judges who make tariffs and taxing masters who interpret them are no longer practising lawyers. Some of them who might be named were once known to be keen hands at a bill of costs, and outspoken on the subject of the "butcher knife." It is somewhat remarkable that when these persons retire on a salary they undergo a change in their views as to costs and what used to appear very reasonable becomes excessive. We suppose it is because "misfortune likes company."]

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887. 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. APRIL 15, 1887. No. 8.

DIARY FOR APRIL.

17. Sun.....*Low Sunday.*
23. Sat.....St. George's Day.
24. Sun.....*2nd Sunday after Easter.* Battle of Fish Creek, 1885.
25. Mon.....Bank of England incorporated 1694.
26. Tue .....Primary examination of students and articled clerks, University graduates and matriculants seeking admittance to L.S to present p'rs.
30. Sat.....Last day for filing papers with Sec. Law Soc. before call or admission.

TORONTO, APRIL 15, 1887.

LAW BOOKS.

IN this age of revolutions, social, scientific and otherwise, not the least is that affecting books and book-making. The legal fraternity have been "struck" on this occasion, but the storm has been of a gentle nature, calculated to soothe the nerves of men excited by the ravages of the unlicensed hordes which have swept over and desolated their once verdant pastures. The anti-climax is that the Blackstone Publishing Company of Philadelphia are republishing on this continent a selection from the great legal text books of England, with great promptitude, and at prices so absurdly low, as to enable even every student who enters an office to secure a good law library by the time he is ready to begin practising. The publishers propose to give verbatim reprints of standard text books issued in England after January 1, 1885 (with occasional translations from German and French books), immediately on receipt of copy, making 3,000 to 10,000 pages a year (eight to twelve subjects), in twelve volumes, delivered free of mail or express charges, at the rate of one volume a month, for $15 a year, payable in advance. We need not say what a boon this will be to all professional men and students in this country and the United States.

The following have already been published and distributed to subscribers:—

On December 1st, 1886: Smith on Master and Servant. January 1st, 1887: Challis on Real Property. February 1st, 1887: DeColyar on Guarantees, Principal and Surety. March 1st, 1887: Smith (Horace) on Negligence, 2d Ed. April 1st, 1887: Blackburn on Sales, 2d Ed. These will be followed by Pollock on Torts, Taylor on Evidence (two volumes containing 1,935 pages), May on Fraudulent Conveyances, etc., etc.

The year began on December 1st, 1886, but all persons who subscribe after April 1st will receive in their subscription the complete series of twelve volumes for the year commencing on 1st December last.

The selection so far is very good. No lawyer who desires to keep up even a small library can well afford to be without the text books chosen; they are almost as useful on this continent as in England.

RECENT ENGLISH DECISIONS.

The March number of the *Law Reports* comprise 18 Q. B. D. pp. 313-451; 12 P. D. pp. 45-104; 34 Chy. D. pp. 217-422 and 12 App. Cas. pp. 1-183.

LARCENY—RESTITUTION OF PROCEEDS OF STOLEN PROPERTY—(R. S. C. c. 174, s. 250).

In the *Queen* v. *The Justices of the Central Criminal Court*, 18 Q. B. D. 314, the Court of Appeal held that no appeal would lie to that court, from the order of a Queen's Bench Divisional Court discharging an order for a *certiorari* to remove an order for restitution of the proceeds of stolen goods, on the ground that it was a judgment "in a criminal cause or mat-

ter." The decision of the latter court is reported in 17 Q. B. D. 598, and was noted *ante*, vol. 22, p. 377. The Court of Appeal, although holding that they had no jurisdiction, nevertheless expressed the opinion that the order for restitution complained of, which had been made against an agent of the convict who held the proceeds of the stolen goods in his hands for the convict without notice of the fraud, was properly made.

REVESTING OF PROPERTY OBTAINED BY FALSE PRETENCES —R. S. C. c. 174, s. 250—SALE IN MARKET OVERT—INNOCENT PURCHASER.

The next case, *Vilmont* v. *Bentley*, 18 Q. B. D. 322, is another illustration of the same branch of the law. This was a civil action brought by a person who had been induced to part with his property by false pretences, to recover it from an innocent purchaser, who, before the conviction, had purchased it in market overt. The Court of Appeal (overruling *Moyce* v. *Newington*, 4 Q. B. D. 32, and reversing the decision of Denman, J.,) held that the plaintiff was entitled to succeed under 24 & 25 Vict. c. 26, s. 100, from which R. S. C. c. 174, s. 250, is taken, and that it was not necessary that an order for restitution under that section should be first obtained.

PRACTICE—ATTACHMENT OF DEBTS—ASSIGNEE OF JUDGMENT.

The short point determined by the Divisional Court (Huddleston, B., and Manisty, J.), in *Goodman* v. *Robinson*, 18 Q. B. D. 332, is, that an assignee of a judgment is a person who has "obtained" a judgment, and may enforce it by obtaining a garnishee order attaching debts due to the judgment debtor. Under Ont. Rule 370, the question discussed in this case could hardly arise, as that Rule expressly enables the judgment creditor "or the person entitled to enforce the judgment" to obtain a garnishee order.

ELECTION EXPENSES—RETURN OF EXPENSES.

In re Robson, 18 Q. B. D. 336, was a decision under a statute requiring candidates at municipal elections to make a return of their expenses similar to that required under R. S. C. c. 8, s. 120, and R. S. O. c. 10, s. 186, and it was held that the return must be made though no expenses had been incurred.

MARINE INSURANCE—FULL INTEREST ADMITTED—19 GEO. II. c. 37, s. 1.

Berridge v. *Man On Insurance Company*, 18 Q. B. D. 346, was an action on a policy of marine insurance. The plaintiff had made advances on a ship; the policy in question was issued to insure those advances, and contained the words "full interest admitted." It was argued that the policy not being on the ship or goods was not within the statute 19 Geo. II., c. 37, but the Court of Appeal (affirming Pollock, J.,) held that the policy was one within the Act, and the words "full interest admitted" vitiated it, as being a contravention of its provisions forbidding insurances "without further proof of interest than the policy."

MUNICIPAL ELECTION—DISQUALIFICATION OF CANDIDATE —RETURNING OFFICER, DUTY OF.

The *Queen* v. *The Mayor of Bangor*, 18 Q. B. D. 349, furnishes us with some interesting law on the subject of municipal elections and the duties of returning officers. Two candidates for the office of councillor were nominated, and the nomination accepted, and a poll took place. At the close of the poll, P., one of the candidates, claimed that whatever might be the result of the poll he was entitled to be declared elected, because the other candidate held the office of alderman, and was therefore disqualified for election as a councillor. The returning officer counted the ballots, and announced that the alleged disqualified candidate had the majority of votes, but he reserved his decision as to whom he should declare to be elected, until he had considered P.'s objection. On the following day he published a placard stating that P. had been elected.

Both P. and the other candidate accepted the office, and attended the meeting of the council, but the majority of the council refused to recognize P. as a member of the council, and he then applied for and obtained a *mandamus* to the mayor and corporation to receive his votes at corporate meetings. On appeal from the order awarding the *mandamus*, the Court of Appeal held that the returning officer had no power to decide on the question of disqualification, and that his duty was simply to declare the person having the majority of votes elected; that by stating the number of votes for each candidate he had made a sufficient declaration, and that the

effect of this declaration was not altered by reason of the notice issued on the following day, and that P. was not *de facto* councillor, and entitled to hold the office until dispossessed by an election petition or by *quo warranto*. This case, no doubt, would be a guide in interpreting R. S. O. c. 18, s. 159.

MARINE INSURANCE—ADVANCED FREIGHT, INSURANCE OF—SUBROGATION OF INSURER TO RIGHTS OF INSURED.

In *Dufourcet* v. *Bishop*, 18 Q. B. D. 373, goods were shipped on defendants' ship under a charter party; the freight was paid in advance, and the plaintiffs bought the goods from the charterers at a price including the freight and insurance. The cargo was lost through the defendants' negligence. The action was brought to recover for the loss. The question was whether the plaintiffs were entitled to recover as part of the damages they had sustained a sum of £600, being the amount of the advanced freight, it being admitted that as to this part of the claim the action was being carried on for the parties who had insured the freight, and by whom the plaintiffs had been indemnified as to this part of their loss. Denman, J. held that the plaintiffs were entitled to recover this amount as part of the damages sustained by them by the loss of the cargo.

INTERPLEADER—PARTICULARS OF CLAIM OF CLAIMANT.

In *Hockey* v. *Evans*, 18 Q. B. D. 390, the Court of Appeal reversed a judgment of the Master of the Rolls. Goods had been seized in execution, and the plaintiff in the present action had claimed them under a chattel mortgage, under which he claimed there was due to him £750 and interest. The sheriff interpleaded, and in the interpleader proceedings the sheriff was ordered to sell the goods, and out of the proceeds to pay the plaintiff the amount claimed. The sheriff accordingly sold, and paid the plaintiff the £750 and interest, but the plaintiff also claimed a further sum of £23 for costs, which not being paid, this action was brought to recover it. At the trial the Master of the Rolls gave judgment for the plaintiff for the amount of the costs; but the Court of Appeal held that the plaintiff was bound by the particulars of his claim, the order for sale being made in reference to that claim; and, as Sir James Hannen justly observed, to throw on the sheriff the duty of determining the validity of any other claim, would put him in the difficulty from which it was the object of the interpleader procedure to free him.

PRACTICE—JURISDICTION OF MASTER IN CHAMBERS.

In *Oppert* v. *Beaumont*, 18 Q. B. D. 435, it was held by the Court of Appeal, that under Ord. 58, r. 16, which provides that "an appeal shall not operate as a stay of execution. . . except so far as the court appealed from, or any judge thereof, or the Court of Appeal may order," the Master in Chambers, as having all the jurisdiction of a Judge in Chambers, except certain specified matters of which this was not one; might make an order staying execution pending an appeal.

NEGLIGENCE—EVIDENCE—BURDEN OF PROOF—COLLISION—SHIP AT ANCHOR.

Proceeding now to the cases in the Probate Division, the first which demands attention is *The Indus*, 12 P. D. 46, which was an action to recover damages for a collision. It appeared that the defendants' ship, while in motion, came into collision with the plaintiffs' ship which was at anchor, and it was held that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen, was *prima facie* evidence of negligence on the part of the defendants, and that the burden of proof was on them to rebut the presumption of liability.

COLLISION—DAMAGES FOR LOSS OF LIFE—LORD CAMPBELL'S ACT.

In *The Bernina*, 12 P. D. 58, the Court of Appeal (reversing the decision of Butt, J.,) held that when a collision had occurred through the fault of both vessels, and two persons—an engineer and a passenger—on board of one of them, but who had nothing to do with the navigation, were drowned, they were not to be deemed to be identified with those in charge of the vessel on board of which they were, so as to deter their personal representatives from maintaining an action of negligence against the owners of the other vessel; and (affirming Butt, J.,) that actions under Lord Campbell's Act are not Admiralty actions, and the Admiralty rule as to half damages does not apply to them. This case is remarkable and deserving of careful attention, for the elaborate discussion it contains of the principle of law involved. The cases of *Thorgood*

v. *Bryan*, 8 C. B. 115, and *Armstrong* v. *Lancashire and Yorkshire Railway Co.*, L. R. 10 Ex. 47, were overruled.

The law bearing on the question is thus summarized by Lord Esher, M.R., at p. 61:

(1) If no fault can be attributed to the plaintiff, and there is negligence by the defendant, and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer. (2) If in the same case the negligence is partly that of the defendant personally, and partly that of his servants, the plaintiff can maintain an action either against the defendant or his servants. (3) If in the same case the negligence is that of the defendant's servants, though there be no personal negligence by the defendant, the plaintiff can maintain an action either against the defendant or his servants. (4) If in the same case the negligence, though not that of the defendant personally or of a servant of the defendant, consists in an act or omission by another, done or omitted to be done in the way in which it is done or omitted to be done by the order or direction or authority of the defendant, the plaintiff can maintain an action either against the defendant or the person personally guilty of the negligence. (5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident; as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain the action against the defendant. (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one. (7) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one. (8) If, although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one.

At p. 82 he adds:

That the propositions above stated contain the law on this matter, perhaps not exhaustively, and that the proposition contained in *Thorogood* v. *Bryan* is not to be added to them.

EVIDENCE—LETTERS OF ADMINISTRATION—DECLARATION OF DECEASED PARENT.

In the goods of *Thompson*, 12 P. D. 100, upon an application for letters of administration to the estate of a deceased child, the court allowed the birth and death of the child to be proved by evidence of declarations of its deceased mother.

PRACTICE—THIRD PARTY OBTAINING LEAVE TO DEFEND—DISCOVERY.

Turning now to the cases in the Chancery Division, the first to be noted is *Eden* v. *Weardale Iron Co.*, 34 Ch. D. 223, in which the Court of Appeal (affirming Kay, J., and following *McAllister* v. *Bishop of Rochester*, 5 C. P. D. 194) held that when a third party obtains an order directing that the question of indemnity between him and the defendant should be tried after the trial of the action, and giving him liberty to appear at the trial and oppose the plaintiff's claim so far as he was affected thereby, and to put in evidence, and cross-examine witnesses, that he was liable himself to be examined by the plaintiff before trial for the purpose of discovery.

MARRIED WOMEN'S PROPERTY ACT, 1882, ss. 5, 19 (47 VICT. c. 19, ss. 5, 17 [O.]).

In *Re Whitaker, Christian* v. *Whitaker*, 34 Chy. D. 227, the Court of Appeal expound the Married Women's Property Act, 1882, ss. 5, 19, from which 47 Vict. c. 19, ss. 5, 17 (O.), is adapted. By *ante* nuptial settlement of 1873 a husband and wife covenanted to settle after acquired property of the wife, other than personal chattels, savings out of her separate income, or any moneys not exceeding in each case £1,000; "or any property belonging, or which may be given or bequeathed to, or settled upon her for her separate use, all which excepted articles and property shall belong to the said wife, and shall or may be used, enjoyed, and disposed of by her accordingly as if she were not under coverture." Under the will of the wife's father, made in 1884, the wife became entitled to a share of personalty exceeding £1,000, and not limited to her separate use. It was contended that the effect of sec. 5 of the Act of 1882 was to make this bequest the wife's separate property, and that therefore it was not subject to the covenant for settlement. But the Court of Appeal held that the effect of sec. 19 (47 Vict. c. 19, s. 17 O.,) was to limit the operation of sec. 5 by preventing property which would, independently of the Act, have been subject to the trusts of a marriage settlement, from becoming separate property, and therefore the property in question was bound by the covenant.

LIFE POLICY—PAYMENT OF PREMIUM BY PERSON NOT ENTITLED—LIEN—SALVAGE.

In *Falcke* v. *Scottish Imperial Insurance Co.*, 34 Chy. D. 234, an attempt was made to establish a claim to a lien on a life policy for

the amount of a premium which had been paid by the owner of the equity of redemption in the policy, under the belief that a contract had been made by the mortgagee to assign the policy to him, there being in fact, as the court found, no binding contract to that effect. The Court of Appeal (reversing Bacon, V.-C.) held that the claimant was not entitled to any lien for the amount so paid, although the mortgagee got the benefit of it, and that the claim could not be maintained on the ground of salvage of the security, or acquiescence on the part of the mortgagee.

Cotton, L.J., thus states what he considers the effect of the payment, at p. 243:

It is true that here the mortgagor, the ultimate owner of the equity of redemption, was no longer personally liable to pay the sums charged on the policy, and was not bound by the covenant to pay the premium (he had obtained a discharge in bankruptcy), but he pays it as the owner of the equity of redemption entitled to the ultimate interest in the property, although not personally bound to pay the debt or provide for the premium. It must be considered, in my opinion, that he paid it, not so as to get any claim in priority to the incumbrances, but in order to retain the benefit of the interest which would come to him if the property proved sufficient to pay off the previous incumbrancers. In my opinion, it would be utterly wrong to say that a mortgagor, the owner of the equity of redemption, can, under those circumstances, defeat the incumbrances on the estate.

With regard to the doctrine of salvage we may refer to what Fry, L. J., says at p. 254:

We have heard a great deal on both sides of what has been called the doctrine of salvage. I, like V.-C. Kindersley, exceedingly doubt whether that word can with propriety be applied to cases of this description. With regard to salvage, in case of ships and maritime perils, we know its meaning. It appears that the expression "salvage moneys," as we are informed by one of the learned counsel for the appellant, first occurs in the report of the case, *In Re Thorp*, 2 Sm. & G. 578, n., which was before Lord St. Leonards in 1852, when he seems to have used the expression as one familiar to the Irish courts in certain cases. I certainly wish the expression had remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word "salvage" applies to cases of this description.

WILL—CONSTRUCTION—MISDESCRIPTION OF LEGATEE—COUSIN—EVIDENCE.

In re Taylor, Cloak v. *Hammond*, 34 Chy. D., can hardly be said to be a satisfactory decision. The Court of Appeal reversed the decision of Pearson, J., but inasmuch as Bowen, L.J., dissented, the net result of the case is that two judges were of one opinion, and two of another. The case turns on the construction of a will whereby a testatrix gave a share of her residue to her cousin Harriet Cloak. The difficulty arose from the fact that she had no cousin of that name, but she had a married cousin, Harriet Crane, whose maiden name was Cloak; and she had a cousin, T. Cloak whose wife's name was Harriet. Pearson, J., and Bowen, L.J., thought Harriet Crane was entitled, but Cotton and Fry, LL.J., thought the wife of T. Cloak was the one entitled.

SELECTIONS.

PRECAUTIONS ON INVESTMENT BY TRUSTEES.

The power of trustees to invest is gradually becoming more and more limited by the decisions of the Equity judges, and we propose briefly to call attention to some of the precautions which recent cases show that advisers of trustees ought to take so as to secure their clients from future trouble and loss. In the first place, they must see that the mode of investment is authorized by the power. In *Leigh* v. *Leigh* (55 L. T. Rep. N. S. 634), Mr. Justice Stirling held that trustees could not, under a power to invest on "real securities," invest on mortgage of long terms of years, created in real estate for the purpore of raising portions; and, of course, leaseholds are not real securities (*Jones* v. *Chennell*, 38 L. T. Rep. N. S. 494; 14 Ch. Div. 626).

But trustees, besides taking care that an investment is made on a security authorized by the power, must be careful to see that it is good of its kind, and that a sufficient margin of value is left. They cannot safely invest more than two-thirds value on freehold land, nor more than half value on freehold house property. In the case of buildings used in trade, they should not invest as much as half value, and where the trade or business is of a

speculative or fluctuating nature, they will do well altogether to decline the investment (see *Re Whiteley, Whiteley* v. *Learoyd*, 55 L. T. Rep. N. S. 564; 33 Ch. Div. 347). The trustee should employ a competent valuer who is acquainted with the neighbourhood where the property on which it is proposed to effect the loan is situate (*Fry* v. *Tapson*, 51 L. T. Rep, N. S. 326; 28 Ch. Div. 268). The valuer should not be one chosen or employed by the borrower, nor should his remuneration wholly or in part depend on the result; he should be paid the same whether the loan is effected or not. The mortgagee should choose and pay his own valuer, the fee being ultimately paid by the mortgagor. The plan of the mortgagee's solicitor saying to the borrower, "Go and get a valuation from Mr. ——" can hardly be considered safe, for the valuer is employed by the borrower, though named by the lender. Probably the best plan would be for the proposed lender to decline to enter upon the transaction unless the borrower would deposit the fee with him for payment of the surveyor, whatever the report should be, and then if the report was unsatisfactory, and the loan was not effected, the trustees would be protected from loss.

The form of the valuation should next receive attention. It should state the selling value of the property, not merely give the opinion of the surveyor that it is a sufficient security for so much (*Whiteley* v. *Learoyd, ubi sup.*). It should not be a "puffing" valuation (*Fry* v. *Tapson*). It should call attention to any facts likely to affect the value, and show that a proper deduction has been made in the valuation. Where rates and taxes are paid by the landlord, the valuation should show that due allowance has been made (*Olive* v. *Westerman*, 51 L. T. Rep. N. S. 83; 34 Ch. Div. 70). Property consisting of unoccupied houses (*Hoey* v. *Green*, W. N 1884, p. 236; 78 L. T. 96; *Smethurst* v. *Hastings*. 52 L. T. Rep. N. S. 567; 30 Ch. Div. 490) and unlet property are unsafe, and so are houses greatly out of repair, even though allowance is made in the valuation. It may be thought that these precautions are embarrassing and troublesome; but nevertheless, as the law now stands, they are essential to the safety of trustees.—*Law Times.*

SOLICITOR TRUSTEES.

The recent cases of *Re Corsellis, Lawton* v. *Elwes* (45 L. T. Rep. N. S. 167; 33 Ch. Div. 160; and on appeal, the *Law Times* of the 12th Feb., 1887), and *Re Barber, Burgess* v. *Vinnicome* (the *Law Times*, 14th Aug., 1886; 34 Ch. Div. 77), have called into prominence a somewhat old question, namely, the right of a trustee who is also a solicitor to profit costs for business done by him in his professional capacity in connection with the trust. Ever since the leading case of *Robinson* v. *Pett* (3 P. Wms. 132, 1,734), and previously thereto, it has been well established that a trustee, executor, or administrator shall have no allowance for his care and trouble. But the application of the rule to the case of a solicitor-trustee transacting the business of the trust appears not to have taken place till the year 1833, when Lord Lyndhurst in the case of *New* v. *Jones* (mentioned in 9 Bythewood's Conveyancing by Jarman, p. 338), decided that if a trustee who was a solicitor acted as such in the trust he was not entitled to charge for his labour, but merely for his costs out of pocket. "The principle," said his Lordship, "was this; it was the duty of an executor or trustee to be the guardian of the estate committed to his charge. If he were allowed to perform the duties of the estate, and to claim compensation for his services, his interest would be opposed to his duty, and as a matter of prudence this court could not allow an executor or a trustee to place himself in such a situation. If he chose to perform those duties, he was not entitled to compensation. His Lordship was of opinion that the principle applied as strongly to the case of an attorney as to that of any other person. If an attorney who is an executor performs business that was necessary to be transacted; if this executor, being an attorney, performs these duties himself, his Lordship was of opinion that he (the attorney) was not entitled to be repaid for those duties; it would be placing his interest at variance with the duties he had to discharge. It was said that the bill might be taxed; and that this would be a sufficient check. He was of opinion it would not be a sufficient check. The estate had a right not only to the protection of the taxing officer, but

also to the vigilance and guardianship of the executor or trustee in addition to the check of the taxing officer." That seems to us to contain the whole principle, and has been followed in subsequent cases. See *Moore* v. *Froude* (3 My. & Cr. 45 (1837), Lord Cottenham); *Bainbrigge* v. *Blair* (5 L. T. Rep. O. S. 454; 8 Beav. 588); *Todd* v. *Wilson* (9 Beav. 486); *Lyon* v. *Barker* (5 De G. & Sm. 622). The rule applies not only to express trusts, but also to executors and trustees, though there have been no express trusts; thus in *Pollard* v. *Doyle* and *Kearnes* v. *Daw* (3 L. T. Rep. N. S. 432; 1 Dr. & Sm. 319), the facts were shortly these: The action of *Pollard* v. *Doyle* was commenced in 1849 by a judgment creditor of M. in the name of Pollard, as executor and devisee of M., to set aside two deeds as void against the judgment. Pollard died soon after the commencement of the suit, having appointed Kearnes, who was a solicitor, executor and devisee, and he revived the suit. Held, that he was not entitled to any profit costs. The rule also holds good, although the business is done entirely by the partner of the trustee (see *Christophers* v. *White*, 10 Beav. 523); also where a trustee who is not a solicitor employs his co-trustee, who is a solicitor, to do the business (see *Broughton* v. *Broughton*, 26 L. T. Rep. O. S. 54; 5 De G. M. & G. 160). But a trustee, being a solicitor, may employ his partner to act professionally in the business of the trust, provided it be expressly agreed between them that such partner shall alone be entitled to the profits (see *Clark* v. *Carlon*, 4 L. T. Rep. N. S. 361; 30 L. J. N. S. 639, Ch). Vice-Chancellor Wood in that case said that the rule on which the denial of costs to a solicitor-trustee was founded rested mainly on the ground that a trustee should not make a profit out of his trust, and that he could see no reason why a trustee should not be able to say to his partner, "Quoad this transaction we are not in partnership," and that he might then employ his partner in the same way as he might employ his London agent, and the partner would stand in the same position as anybody else. In *Burge* v. *Brutton* (2 Hare, 373) it was formerly decided that an executor who acts as a solicitor in a case in which he is a party in his representative capacity is entitled to be allowed, as against the estate, that proportion of the costs which his town agent is entitled to receive. In the rule under consideration an important exception was made by the well-known case of *Cradock* v. *Piper* (15 L. T. Rep. O. S. 61; 1 Mac. & G. 664), in which it was decided that a solicitor-trustee who acts in a suit as solicitor for himself and his co-trustee and a *cestui que trust*, or for any of his *cestuis que trust* alone, or for himself and co-trustee, or himself and his *cestui que trust* jointly, is entitled to the usual profit costs, provided they are not increased by his being one of the parties. That decision has been the subject of a good deal of adverse criticism both from the Bench and from text writers (see the remarks of Lord Cranworth, L. C., in *Manson* v. *Bailie*, 26 L. T. Rep. O. S. 24; 2 Macq. 80; and in *Broughton* v. *Broughton*, *supra*). But not only has it never been overruled, but it has been uniformly acted upon in the taxing master's office, and in the very recent case of *Re Corsellis*, *Lawton* v. *Elwes* (*supra*), it has received express recognition by the Court of Appeal. There appears, however, to be but little disposition to extend the exception introduced by *Cradock* v. *Piper*. For instance, it does not apply to the case of a solicitor-trustee acting for himself and his co-trustees in the administration of the trust estate out of court (*Lincoln* v. *Windsor*, 18 L. T. Rep. O. S. 39; 9 Hare, 158; *Broughton* v. *Broughton*, *supra*). But, as was remarked by a Lord Chancellor in the latter case, one cannot see any distinction between costs incurred in a suit and costs incurred in administering an estate without a suit—the danger may possibly be less in the former case than in the latter, but the principle is the same.

The question was discussed with some minuteness by Mr. Justice Chitty in the recent case of *Re Barber*, *Burgess* v. *Vinnicome* (34 Ch. Div. 77), where the facts were shortly as follow: A testatrix appointed H., who was a solicitor, and one of the attesting witnesses to her will, and V., executors and trustees of her will, which contained a clause enabling H. to make the usual professional charges, but which clause was rendered inoperative by reason of his having attessted the will. Probate was obtained by V. alone, power

being reserved to H. A creditor's action was commenced against V., and she employed the firm of solicitors in which H. was a partner to conduct the action on her behalf. H. afterwards proved the will and was made a defendant. Held, by Mr. Justice Chitty, that H. was entitled to his profit costs of the action, but not for business not done in the action even though transacted before he obtained probate; the judge expressly stating that on the reported decisions *Cradock* v. *Piper* stood unimpeached. The most recent decision on the point is that of the Court of Appeal in *Re Corsellis*, *Lawton* v. *Elwes*, above referred to. The facts were shortly these; T. (a solicitor and partner with the defendant E.) and F. were appointed executors and trustees of a will dated in 1876, which contained a clause enabling T. to make the usual professional charges. T. died in 1880, and the defendant E. was appointed trustee in his place. In 1881 an application for maintenance out of the estate was made to the court, and E.'s firm acted through their London agents as solicitor for E. and his co-trustee in the matter. E. and his co-trustee appointed E.'s partner steward of a manor which formed part of the trust estate, and he carried the steward's fees to the credit of E.'s firm. In 1881 E. became sole surviving trustee, and an action was then commenced against him to carry into execution the trusts of the will and for the appointment of a receiver. E.'s London agents acted as solicitors for him in such action and credited his firm with part of their proper costs. E.'s firm, by their London agents, acted as solicitors of the receiver appointed in the action, and E. claimed a share of their costs in that capacity; E. also claimed a share of profit costs of certain leases and agreements for leases of parts of the trust estates granted by him and prepared by him or his firm. Held, by Mr. Justice Kay, upon the principle that a trustee ought not to place himself in a situation where his interest conflicts with the duties, that none of the profit costs in the aforesaid matters ought to be allowed out of the trust estate to the defendant E.'s firm or to E. On appeal that judgment was sustained as to three of the items out of five, but as to the remaining two, namely, profit costs in the maintenance proceeding and the steward's fees, the appeal was allowed. The Court of Appeal, consisting of Cotton, Lindley and Lopes, L.JJ., after stating that the exception introduced by the case of *Cradock* v. *Piper* had always been acted upon at the taxing-master's office, and was an established rule of the court, laid down that it ought not to be frittered away, and held that the proceedings for maintenance ware within that rule. They also allowed the steward's fees on the ground that they were not professional charges at all, but were fixed by statute or by custom.

Whether a solicitor-mortgagee will be entitled to profit costs appears to be doubtful. According to the older decisions, it seems that he will not. In *Sclator* v. *Cottom* (29 L. T. Rep. O. S. 309; 3 Jur. N. S. 630) the facts were these: In 1882 E. M. and F. C. mortgaged their life estates in certain renewable leaseholds for lives and money in court to L. M. H. and F. S. (who was a solicitor). Two of the lives having dropped, the persons interested in the remainder in the mortgaged premises commenced a suit for the purpose of having the renewal fine paid out of the money in court and out of the rents. To this the mortgagees objected, and the suit stood over generally. L. M. H. died, and then a second suit, adverse to the mortgagees, was commenced and was dismissed.

In the first suit F. S. had acted as solicitor for himself and his co-mortgagee, and in the second for himself alone. Held, by Vice-Chancellor Kindersley, that F. S. was only entitled to his costs out of pocket in the aforesaid suit; and the leading text-books on mortgages confirm that view of the law. But in the recent case of *Re Donaldson* (51 L. T. Rep. N. S. 622; 27 Ch. Div. 544), where one of several mortgagees was a solicitor and acted as such in realizing the mortgage security, it was held by Vice-Chancellor Bacon that he was entitled to charge profit costs as against the mortgagor, whether the mortgagees were trustees or not. No doubt there is much force in the point stated in the taxing master's certificate in that case —namely, that if the beneficiaries of the money lent to the mortgagor were taxing the bill, the rule would apply, but that in the case under notice the trust fund would not in any way be diminished by the soli-

citor being allowed profit costs. Upon this, however, the obvious question arises, is not the mortgaged property in a sense a trust fund? In other words, is the relationship between mortgagor and mortgagee that of trustee and *cestui que trust*, or simply debtor and creditor? In this state of the law it will be advisable, whenever a mortgagee is a solicitor, to insert an express provision in the mortgage deed enabling him to make the usual professional charges. But he must be careful to call his client's pointed attention to such provision, and to explain to him the law on the subject, and the effect of the clause; and it has been suggested that such a provision should not be inserted unless the client has independent advice. A form of such a clause will be found at 3 Bythewood & Jarman by Robbins, 4th edit., p. 1,001. It is scarcely necessary to say that a solicitor-trustee may be and usually is expressly authorised by the instrument creating the trust to make the usual professional charges, including charges which are not strictly professional, but which could have been done by the trustee personally, and a neat short form for that purpose will be found in Messrs. Wolstenholme & Turner's Conveyancing Acts, 4th edit., p. 249. But a doubt has been expressed from the Bench whether a clause extending to non-professional charges ought to be inserted without express instructions (see *Re Chapple; Newton* v. *Chapman*, 51 L. T. Rep. N. S. 748; 27 Ch. Div. 587).—*Law Times.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS DIVISION.

DIVISIONAL COURT.

COATES v. COATES.

The judgment in this case, affirmed with costs.

Aylesworth, for the plaintiff.

R. S. Cassels, for the defendants.

PALMER v. MILLER.

Principal and agent—Estoppel—Evidence.

Action to recover commission on sales made by plaintiff while in defendants' employment, the cash, therefor, however, being received after plaintiff left defendants' service.

The defendants, type founders in Edinburgh, employed plaintiff's father as their agent in Canada, to be paid by a commission "on the receipts, i.e., on the cash, bills and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed from the defendants' employment. He wrote complaining of his dismissal, but said that the sting was taken out of it by the defendants having allowed his father $1,250 a year, for which the plaintiff said he was grateful. The plaintiff made no claim then against the defendants, because, as he stated in his evidence, that had he made any, the allowance to the father would have been stopped, and in order to induce the defendants to pay it, and in consequence of such silence and want of action on plaintiff's part, the allowance was paid up to the father's death in 1884. After the father's death the plaintiff for the first time pressed his claim.

Held, that he was not entitled to recover.

Per ROSE, J.—The plaintiff was equitably estopped from maintaining the action.

Per CAMERON, C.J.—The plaintiff, by the express terms of the contract, was only entitled to commission on moneys received during his employment and not afterwards.

Osler, Q.C., and *T. P. Galt*, for the plaintiff.

Robinson, Q.C., and *Hall* for the defendants.

HARTNEY v. ÆTNA INSURANCE CO.

Insurance—Evidence of loss—Proof of loss.

Action on a policy of insurance on a stock of goods. M., the local agent, and through whom the insurance was effected, stated that he had examined the premises, and considered from the size of the store, the appearance of the goods, and the stock book, that when insurance was effected there were goods to the amount thereof. All the goods on the premises were destroyed by the fire on 20th Oct. The defendants' inspector came immediately, and saw plaintiff, who produced a statement shewing the amount of the stock in May—the policy having been effected in June—the sales since then, and invoices of goods purchased up to the time of the fire. The inspector then gave plaintiff a form from which the proof papers were to be made up; and on his return home sent the proof papers with request to fill in same according to the said form, which the plaintiff did, and requesting defendants to notify him if not correct, when would have same made out to defendants' satisfaction. The defendants wrote in reply stating they thought the amount of loss should be $11,734.90 instead of $13,005, the amount claimed; that such sum was not only reasonable, but liberal; and which "we are liable for without prejudice to, or waiver of, any condition of our policy." This letter was received without any objection as to its admissibility. The plaintiff replied that his claim was a just and honest one, but he would accept a deduction of $400 if claim settled at once. The defendants replied that their offer was a fair and reasonable one, and pointed out what they considered the objectionable items of the claim. The plaintiff then made a statutory declaration of the amount of the loss, according to the above form, which he sent to defendants. The defendants wrote, acknowledging above, and stating that, without admitting, but denying any liability, they drew attention to alleged informalities in the proofs in their not specifying loss in detail under each item, and in not giving detailed statement of salvage. The plaintiff then furnished defendants with a statutory declaration giving a detailed statement of his claim.

Held, there was sufficient evidence of the amount of the goods at the time insurance effected, and also of the goods insured being those destroyed by the fire; and also that under the circumstances there would be no objection to the proofs of loss.

McCarthy, Q.C., for the plaintiff.

J. K. Kerr, Q.C., and *Walker*, for the defendant.

UNITED STATES EXPRESS COMPANY v. DONOHOE.

Accomplices—Civil action—Corroboration.

In an action to recover from defendant moneys alleged to have been stolen from the plaintiffs,

Held (GALT, J. dissenting), that the effect of the judge's charge in this case was to leave on the minds of the jury the impression that the evidence of accomplices in crime—where such crime gives rise to a civil action, in which such accomplices are examined as witnesses—ought not to be credited or relied on unless corroborated, and was misdirection.

J. K. Kerr, Q.C., and *Cooper*, for the plaintiffs.

Osler, Q.C., for the defendant.

PROCTOR v. MULLIGAN.

Sale of land—Independent agreements.

On 5th June, plaintiff executed an agreement whereby he agreed to purchase from the defendant a lot in Winnipeg, at and for the sum that might be placed thereon by D. of Winnipeg, provided that if the price fixed exceeded $6,000, the excess should be secured by plaintiff, by mortgage on said property, etc., the sum so fixed to be paid by plaintiff deeding to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement, whereby defendant agreed to purchase from plaintiff, the plain-

tiff's interest in the said Toronto lots for $6,000, the defendant to pay interest and taxes to date, but to deduct the same out of the $6,000. The Toronto property was conveyed to the defendant, who entered into possession and paid off the mortgages on it. The defendant contended that D. had valued the Winnipeg property at $8,000; but the evidence showed that D. had declined to make any valuation. The defendant refused to convey it except at the price of $8,000, and also refused to appoint another valuator. In an action to recover from the defendant the sum of $6,000, the plaintiff intimated that he would accept a conveyance of the Winnipeg property.

Held, that unless defendant accepted offer to make a conveyance, the judgment should be for the $6,000, less a sum of $838.28, paid for interest and taxes, leaving a value of $5,162.72 with interest.

Osler, Q.C., for the plaintiff.

GRAHAM v. ONTARIO MUTUAL INS. CO.

Insurance—Incumbrance—Unreasonable condition.

The application for a policy of insurance against fire stated that there were no incumbrances. The application was filled out by the company's agent. The insured informed him of the existence of a mortgage on the property, when the agent informed plaintiff that if there was nothing overdue thereon it was not an incumbrance; and as there was nothing overdue, and under this belief, the statement was made in the application. A policy was issued shortly afterwards, with conditions endorsed thereon under the heading statutory conditions and variations, No. 13 of which was that any fraudulent misrepresentation contained in its application, or any false statement therein respecting the title or ownership of the property, or the concealment of any incumbrance, or the failure to notify the company of any mortgage or incumbrance upon, or other change in the title or ownership of the insured property, etc., rendered the policy void.

Held (GALT, J., dissenting), that under the circumstances the policy was not avoided.

Chatillon v. *Canada Mutual Insurance Co.*, 27 C. P. 450, followed.

Per GALT, J.—That though before the issue of the policy the insurance was not avoided, yet it would be so thereafter, as under the conditions the plaintiff should have notified defendants of the mortgage.

The fourteenth variation condition was "if any agent or canvasser for this company shall have filled up any part of the application he shall be the insured's agent therefor, and not the company's; and no statement, written or verbal, made to such agent or canvasser as to any matter to which the enquiries in the application extend, shall bind the company or affect the company with notice thereof, unless stated in the application."

Per ARMOUR, J., at the trial, and *per* ROSE, J., in the Divisional Court, that the condition was unjust and unreasonable.

Maclennan, Q.C., for the plaintiff.

McMullen (of London), for the defendant.

WORDEN v. CANADIAN PACIFIC RY. CO.

Railways—Failure to deliver goods—Damages.

The plaintiff, on 2nd March, 1882, delivered to the G. W. Ry. Co. at Lucknow, Ont., 840 bushels of oats to be carried by said railway and connecting railways to Brandon, Man., and there delivered to the plaintiff. The oats were shipped in car No. 6,253, and while in transit, were transferred to car No. 3,966 of the M. & M. Ry. Co. Before the arrival of the oats the plaintiff arranged with defendants' agent at Winnipeg to have car 6,263 stopped at Winnipeg. The oats were not stopped at Winnipeg but were carried on to Brandon. The plaintiff, before leaving Brandon, and making the Winnipeg arrangement, had instructed an agent at Brandon to receive the oats. The oats arrived at Brandon on 5th May, 1882. The plaintiff's agent at Brandon frequently applied for same, and was always informed that they had not arrived. The defendants alleged that after the arrival at Brandon notice thereof was sent by postal card to the plaintiff's proper address at Brandon, and the goods being of a damageable or perishable nature were, on 22nd July, sold. There was no evidence to show that this notice reached the plaintiff. In an action for damages for non-delivery and for conversion,

Held, that the plaintiff was entitled to re-

cover; that defendants were not protected by 42 Vict. c. 9, sec. 17 (D.), and sub-sections, for to come within it the goods must remain in the defendants' possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though sub-section 3 says nothing of demand, the whole section must be read together, which shewed a demand was required; that the post card was not a sufficient demand; that there was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6,263; and that the plaintiff was entitled to recover as damages the value of the oats at Brandon at the time of conversion.

F. Arnoldi, for the plaintiff.

W. Nesbitt, and *P. McPhillips*, for the defendants.

MEAD v. O'KEEFE.

Partnership—Dissolution—Good will.

On the 3rd April, 1882, a deed of partnership was executed by the defendants O. and H. and by M., as malsters and brewers in Toronto for three years. By Clause 20, O., for $25,000, sold and disposed of to H. and M., all his interest in the good will of the firm, etc., theretofore existing between himself and G. M. H. as brewers, etc., as also that which he would be entitled to on the expiration or sooner determination in the partnership then formed, and in the meantime to fully initiate and instruct H. and M. in the business; and he assigned to them all his right, title, interest, claim and demand of in, to or out of the good will of the said business and partnership heretofore existing and carried on by O. & Co., and also in the good will, etc., and covenanted to execute a good and sufficient deed to assign and transfer same. Then followed provisions for O. entering into partnership with either both H. and M. on the determination of the existing partnership, but if not, O. should retire and receive the value of his share, but nothing further for the good will, and he covenanted not to carry on a similar business, etc. Clause 19, provided for the accounts being taken on the expiration or sooner determination of the partnership, and the partners paid the value of their shares. By Clause 29, if either H. or M. should retire from the firm under Art. 2, or be compelled to leave under Art. 3, he should not receive anything for good will. Art. 3 provided for dissolution upon breach or non-observance of any stipulation in certain of the Articles upon notice in writing being given therefor, and the partner receiving notice should be considered as quitting the business for the benefit of the other partners. Subsequently M. misconducted himself in the said business, when O., acting for himself and H., informed M. that he must leave, and the following paper was drawn up: "Notice is hereby given that the partnership heretofore existing between the undersigned as brewers, etc., has this day been dissolved by mutual consent. Messrs, O. and H., who will continue the business, are authorized to collect all debts due to the late firm, and will meet all liabilities." This was signed by O., H. and M. Under this was written: "Referring to the above, the undersigned have this day entered into partnership as brewers, i.e., under the style of O. & Co., who will continue the business as formerly." This was signed by O. & H. A suit was brought by E. M., the assignee of M., under an assignment to her, and a decree was made for an account, but not as to the good will, as it was held this was not covered by the assignment. The good will was then assigned to plaintiff, and this action brought to recover the value thereof.

Held, that the plaintiff, under the circumstances more fully set out in the case, was entitled to recover.

Maclennan, Q.C., and *Osler*, Q.C., for the plaintiff.

Moss, Q.C., and *G. T. Blackstock*, for the defendants.

WILSON v. RYKERT.

Appropriation of payments—Statute of Limitations.

Appropriation of payments are to be applied (1) as the debtor directs at the time of payment; (2) when no direction by debtor, then as the creditor directs: (3) when neither makes any direction, then the law will apply it to the older debt as may be just.

The defendant was indebted to the plaintiff and gave six promissory notes therefor, which fell due in 1871. The interest was paid up to August, 1878. Thereafter three payments were made; two specially on account of interest, and the third without any appropriation.

Held, that the payments must be applied to the interest due on all the notes, the effect of which was to take them out of the Statute of Limitations.

Masters, for the plaintiff.

Osler, Q.C., for the defendant.

GORST v. BARR.

Slander—Privileged communication—Crime.

The plaintiff had been working for a couple of days for the defendant as a seamstress. She was unknown to the defendant before that. The defendant missed $11.00 and so informed plaintiff. In the evening the defendant drove plaintiff home, telling her she would want her again in a week or so. The next day the defendant laid the case before the chief of police, and he said that plaintiff must have taken the money. The defendant then went to a Mrs. W., for whom she thought the plaintiff was working, and on being informed that plaintiff was not there asked to speak to Mrs. W. alone, and then informed her of having missed the money, and of the plaintiff being the only one there except defendant's children and defendant's sister. The defendant stated what the chief of police had said, and asked what she should do—that she would have plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B., for whom plaintiff was working, and called plaintiff outside, and told her what the chief of police had said. The defendant then put her hand on the plaintiff's shoulder and said, "you did; you must have taken it"; and asked her to confess, and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be taken to her father's, and defendant drove her there. Before doing so, plaintiff went upstairs to get her things, when Mrs. B. asked what was the matter, when plaintiff said that defendant accused her of taking some of her money. Mrs. B. said that while defendant and plaintiff were speaking the door blew open, and she heard defendant say, "You did; you must have," and the door then slammed to. When defendant arrived at the father's she did not want to go in, but the father pressed her and asked her what was the trouble. The defendant told him she had lost $11.00, and what the chief of police had said. The father asked defendant if she knew the plaintiff's character, and why she should be accused more than the defendant's sister. The defendant, he said, appeared shocked at that, and said she would have plaintiff arrested, when the father said she would do it on her own responsibility.

Held, that action failed; that the words spoken to the plaintiff and to her father were privileged, while those heard by Mrs. B. did not impute any criminal offence, nor did the words spoken to Mrs. W.

Delamere, for the plaintiff.

Foster, Q.C., for the defendant.

REGINA v. SPROULE.

Canada Temperance Act, 1878—*Interest of magistrate—Witness.*

In a prosecution under the Canada Temperance Act the defendant claimed that J. F. A., one of the magistrates, was a member of an association for the enforcement of the Act, and had been present at a meeting of the association. On the case coming on for trial the defendant objected to the jurisdiction of the magistrate, which was overruled. The license inspector who laid the information then gave evidence in support of the charge. In cross-examination he was asked by defendant as to whether he laid the information of his own accord, or had consulted with J. F. A. before acting, and whether the association had anything to do with the selection of the magistrate. The magistrate ruled that the witness was not bound to answer the questions at the close of the prosecution, and on going into the defence the defendant called the magistrate, J. F. A., as witness, but he refused to give evidence. The defendant was convicted and fined.

Held, that as a general rule a person who lays an information is not bound to disclose the source thereof; but as the questions asked the witness were put with the view of shewing the magistrate was a member of the association

and thus disqualified by interest from sitting, the defendant had the right to put the questions, and they were therefore improperly disallowed; and that the magistrate also should have given evidence when called on.

The defendant, therefore, having been debarred the right of making a full defence as allowed by sec. 30 of 32 & 33 Vict. c. 3 (D.), the conviction could not be sustained, and must be set aside.

The calling of a magistrate sitting in a case as a witness, and his being sworn, does not of itself disqualify him from further acting in the case.

Aylesworth, for the applicant.

Delamere, and *E. F. B. Johnson*, contra.

RE WEIR.

Extradition—Depositions—Authentication of admissibility—Evidence—Sufficiency of—Weight of.

In extradition proceedings the information, warrant and depositions were certified under the hand and seal of a justice of the peace of Oscodo township, in the county of Josio, in the State of Michigan. There was also a certificate under the hand of the clerk of the county of Josio, and clerk of the Circuit Court for the said county, and the official seal of the said Circuit Court certifying that the said justice of the peace was, at the time of signing his certificate, a duly elected and qualified justice of the peace in the active discharge of the duties of the said office, and that his official seals were entitled to full credit.

Held, that the documents were sufficiently authenticated.

Held, also, that the depositions and statements admissible in evidence are not restricted to those made in respect of the charge upon which the original warrant was issued.

Held, also, that the depositions, etc., before the county judge, before whom the extradition proceedings were had, disclosed sufficient evidence to warrant the defendant being placed on his trial for murder, caused, as was alleged, by the defendant having feloniously ravished the deceased while in such a state of health as to hasten her death.

Per CAMERON, J.—The Divisional Court cannot review the decision of the judicial officer having jurisdiction to hear extradition cases upon the weight of evidence merely; and, *per* ROSE, J., it was not necessary to express any opinion on this point.

THORNE v. WILLIAMS.

Ejectment—Deed, Alteration of—Equitable title—Adding party.

In an action to recover possession of land it appeared that one of the deeds required in proving plaintiff's title was altered by the grantor's agent under the authority of a letter from the grantor.

Held, that the deed was void, but that the plaintiff was entitled to recover on his equitable title. Leave was granted to add the owner of the legal estate as a party plaintiff.

J. E. Robertson, for plaintiff.

McCullock, for defendants.

Rose, J.]

O'RORKE v. CAMPBELL.

Illegitimate child—Custody and care of.

The father of an illegitimate child has the right to the custody and care of the child as against a stranger or person other than the mother. That the mother has the right as against the father, and father has the right as against the grandfather and grandmother.

Action for food, clothing, lodging and other necessaries supplied by child's grandmother at mother's request.

Defence: That defendant demanded from plaintiff (the infant's maternal grandmother), and from the child s mother, the person of the infant, both of whom refused to comply. Averment that he is, and always has been, ready and willing to support the child and furnish it with food, etc.

Held (on demurrer), that the statement of defence furnished a good answer to the action.

J. H. Ferguson, for the demurrer.

Aylesworth, contra.

BEAM v. ABSALOM MURNER.

Patent of invention—Threshing machines—Omission to label—Royalties and damages—Change in co-partnership—Right to dispute patent—Principles of patent.

The jury having found that the machines were manufactured after the principle of plaintiff's patent, and that plaintiff had sustained damage by reason of the breach of defendants' covenant, the learned judge, before whom the action was tried, directed judgment to be entered for plaintiff, for the royalties and damages.

Held, that the plaintiff was entitled to judgment in respect to both royalties and damages.

That a change in defendants firm did not disentitle plaintiff from recovering from the new firm.

That it was not open to the defendant to dispute the validity of plaintiff's patent.

That the jury was warranted in finding that the machines were made after the principle of the plaintiff's patent.

John King, for the plaintiff.

Osler, Q.C., and *E. P. Clement*, for the defendant

BEAM v. SIMPSON MURNER.

Patent of invention—Right to manufacture and sell—Payment of royalty—Infringement of—Estoppel—Want of novelty—Subject of patent.

Action for the recovery of royalties payable under an agreement in the manufacture by defendant of a threshing machine patented by plaintiff.

Held, that the defendant constructed the machine under the agreement, and must pay the royalties.

That the defendant could dispute the validity of the patent because of want of novelty, nor that it was not the subject of a patent.

That the combinations were properly patented.

That plaintiff was estopped from setting up a defence which had been negatived in a former action between the same parties.

Colquhoun, for the plaintiffs.

Osler, Q.C., and *E. P. Clement*, for the defendant.

STEINHOFF v. MCRAE.

Conversion—Saw logs—Finding of jury—License to take timber after time expired before removal—Parol evidence—Admissibility.

In trover for certain timber, the defendant claimed under a contract for sale thereof to him. The jury in reply to a question stated that it was one of the conditions of sale that the timber had to be removed within two years. All the other questions having been answered in plaintiff's favour, the learned judge entered judgment for plaintiff.

On motion of the defendant to enter judgment in his favour on the ground that the jury having found that the license was for a time that had expired, plaintiff must fail.

Held, following *Johnson* v. *Shortend*, 12 O. R. 633, that the judgment was wrong.

Parol evidence is admissible to explain or contradict a receipt, which is not a contract.

Rose, J.]

SCOTT v. SCOTT.

Will—Execution—Validity.

A testator brought his will, which had been previously signed by him, to two persons to sign as witnesses. The witnesses signed in the testator's presence at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature.

Held, that the will was validly executed.

Graham, for the plaintiff.

Elgin Meyers, contra.

Rose, J.]

ROSS v. WILLIAMSON.

Document—Loss of—Proof of contents—Necessary evidence of.

Where a party endeavours to prove by oral testimony the contents of a written document, the court before giving effect to such testimony should be convinced that all the terms have been proven.

It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but must set out the whole agreement so that the court may be able to give effect to all its provisions, and that by testimony of the clearest nature.

In this case the learned judge was of opinion that the defendant, the party setting the agreement, had failed to establish.

G. T. Blackstock, and *Walsh*, for the plaintiff.
Fletcher, for the defendant.

CHANCERY DIVISION.

Div'l Ct.] [January 8.

LAWRENCE v. THE CORPORATION OF THE VILLAGE OF LUCKNOW.

Corporation—By-law—Contract—Novation of—Meeting of councillors—Taking possession of building—Acceptance of work on executed contract—Liability of corporation.

The defendants passed a by-law, approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lockup, firehall, council chamber and public hall," for the purpose of acquiring the land, and erecting such a building at a cost of $4,500, for the raising of which sum provision was therein made. B.'s tender for carpenter work, etc. (including a shingle roof), was accepted, but at a special meeting of the council, at which only three of the councillors, with B. and L., the plaintiff, were present, an arrangement was made by which B. threw off $4 a square, and was relieved of the roof part of his contract, and L. agreed to put on a metallic roof at $6 a square, and it was resolved by the council that "the iron shingles, instead of wooden shingles, be put on the roof of the new Town Hall." All this was done subject to the approval of the Reeve, who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the discovery of some defects in B.'s work the defendants refused, although they had taken possession of the building, to pay the balance on the ground that the roof was not properly done, and that L. was a sub-contractor under B., and that there was no contract under seal with them.

Held (affirming O'CONNOR, J.), that the legal effect of this was to consummate a tripartite agreement by which B. was to give up part of his contract, and L. was to do the work for a specified price. That, between the plaintiff L., the defendants and B., there was a novation of contract so far as the roof was concerned, and as to that L. became the principal and only contractor.

Held, also, that the taking possession, payment on account, etc., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and *de facto* performance of the contract by one party, of which the other party has taken, received and enjoyed the benefit." *The Mayor, etc., of Kidderminster* v. *Hardwick*, L. R. 9 Ex. 18, cited. *Munro* v. *Butt*, 8 E. & B. 738, distinguished.

A municipal corporation is liable on an executed contract for work done by its order, on its behalf, and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of large amount. *Robins* v. *Brockton*, 7 O. R. 481, referred to.

Cassels, Q.C., for the plaintiff.
Garrow, Q.C., for the defendants.

Div'l Ct.] [January 8.

WELLS v. LINDOP.

Slander—Denial of, by pleading—Evidence of privileged occasion—Amendment.

W. was in the employ of a mining co., of which L. was president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the headquarters of the co. (her home). After he ceased to be employed by the co., but while still in the mining district, and before he was settled with and paid up, his wife with a companion, went to L. to apply for some of her husband's wages, and he replied, "We do not owe him anything now, he

stole the boat, the cooking stove, and a lot of other things and sold them." The secretary of the co. had previously received a letter stating that the plaintiff had done what the defendant said. The defendant, by his statement of defence, denied using the words, and gave evidence to that effect at the trial, but proposed also to give evidence that whatever the words used were, he honestly believed them to be true, and leave was asked to amend by setting this up. The judge who tried the case held that the occasion was not privileged, and refused to allow the amendment, and on a motion for a new trial it was

Held (reversing O'CONNOR, J.), that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove malice.

Aylesworth, for the motion.

D. J. Donohue, contra.

Proudfoot, J.] [February 2.

STEWART v. GAGE.

Assignment for benefit of creditors — Judgment against assignor after assignment—Proof of claim—Statute of Limitations—Balancing of accounts—Payments on account—Appropriation of payments—Interest.

S. was assignee of J. E., and G. was assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E., both on an account for money lent, and as holder of certain promissory notes. After the assignments, S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. on said judgment, and asked an account of G.'s dealings with the estate of E. H. E.; G. set up the Statute of Limitations. On a reference to a Master he found (1) That the judgment was an answer to the defence of the Statute of Limitations. (2) That there had been a balancing of accounts between J. E. and E. H. E. as to the accounts before E. H. E.'s assignment, and as to the notes after E. H. E.'s assignment, and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations. (3) That before the assignments, and within six years of action brought, E. H. E. paid several sums to J. E. on general account, and that such payments as far as the general account outside of the notes was concerned, prevented the operation of the Statute of Limitations. (4) That E. H. E. agreed to pay interest to J. E., and he allowed it to him. (5) That he disallowed some of the items of the judgment as having been proved outside of the judgment. (6) That he disallowed certain sums of money omitted from plaintiff's claim—although proved to his satisfaction—as outside the scope of the reference.

On an appeal from the Master, it was

Held, that the judgment recovered against E. H. E. after his assignment in an action in which G. was not a party was not even *prima facie* evidence against G. *Eccles* v. *Lowry*, 23 Gr. 167, considered.

That the balancing of accounts before the assignments upon the general account, and the payments on account were sufficient to prevent the operation of the Statute.

That the balancing of accounts after the assignment as to the notes did not prevent the operation of the Statute.

That the payments made on general account being appropriated to the account of the whole indebtness including the notes, the notes were not barred by the Statute.

That the interest was properly allowed—as it was included in the balancing of accounts, and the notes were payable with interest.

Marsh, for the plaintiff.

W. M. Clark, for the defendant.

Ferguson, J.] [February 12.

THE HAMILTON AND MILTON ROAD CO. v. RASPBERRY.

Statutory remedy for penalty—Injunction.

On a motion by a road co. for an injunction to restrain R. from passing through toll gates without paying the tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under sec. 129 of R. S. O. c. 152 the court would not interfere by way of injunction.

Held, that if the plaintiffs establish a *prima facie* case in regard to the rights they claim there is jurisdiction to interfere by way of

injunction pending the determination of the question at the trial, and an injunction was granted upon a consideration of the balance of convenience in favour of the plaintiffs.

Letten v. *Goodden*, L.R. 2 Eq. 130, and *Cory* v. *Yarmouth etc., R. W. Co.*, 3 Ha. 593, considered and followed.

Waddell, for the plaintiffs.

Osler, Q.C., for the defendant,

Ferguson, J.] [March 30.

THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO v. LEWIS ET AL.

St. James' Rectory—Imp. Stat. 31 Geo. III. c. 31, sec. 38—Endowment of rectory with lands—City rectory—Township rectory—Sale of lands under 29 & 30 Vict. c. 16—Distribution under 41 Vict. c. 69 (O.)—City incumbents—Township incumbents—Who entitled to participate.

The Church of St. James was erected into a rectory at the city of Toronto within the said township (York), by patent, under Imp. Stat. 31 Geo. III. s. 38, in 1836, and was endowed at different times with lands, situate some in the city of Toronto and some in the township of York.

When the lands were sold under 29 & 30 Vict. c. 16, and had to be distributed by the Synod under 41 Vict. c. 69 (O.), there were clergymen of parishes in the city of Toronto and in the township of York, and it was contended that only those clergymen of the city parishes were entitled to participate in the distribution of the fund.

On a special case being stated for the opinion of the court, it was

Held, that the city of Toronto was for the purposes of the grant erecting the rectory considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory.

That the duties of the first rector of St. James extended over the whole township. The township was his parish.

That the incumbents of the Churches in the township must, under 41 Vict. c. 69, s. 2 (O.), be included among the participants of the fund, unless there is some reasonably clear enactment taking their rights away which does not appear either in that statute or 29 & 30 Vict. c. 16.

Moss, Q.C., for the plaintiffs.

Robinson, Q.C., and *McMichael*, Q.C., for the township incumbents.

Maclennan, Q.C., for the city incumbents.

Boyd, C.] [April 7.

GILMORE ET AL. v. GILMORE ET AL.

Will—Devise—Lands charged with legacies conveyed during lifetime of testator—Effect of maintenance—Dower—Election—Personal estate—Legacies payable out of.

J. G., by his will, (1) devised lands to his son, J. G., Jr., (3, 4 and 5) devised lands to three grandsons, (7, 8, 9 and 10) devised legacies to four different daughters and charged them upon the lands devised to J. G., Jr., (16) charged the lands devised by 3, 4 and 5 with the maintenance and support of his widow for life, and two infant children until they became of age, and inserted two clauses in these words: "And I hereby charge the executors of this my last will and testament, hereinafter named, with the performance and execution of all trusts and charges by me heretofore made, the same to be borne out of my personal estate. I further charge that my personal estate be sold by my executors hereinafter named, said personal estate consisting of all goods and chattels, farm stock and utensils, same to be equally divided after all debts and funeral and testamentary expenses be paid, the same to be equally divided between all my children."

The testator in his lifetime conveyed the land covered by clause 1 to J. G., Jr., without any reference to the charges created by 7, 8, 9 and 10.

Held, that the widow was entitled to both dower and maintenance out of the lands charged with the maintenance.

That the infant was entitled to maintenance, and the benefit under the will, to be invested and accumulate for him.

That there was no intestacy as to any part of the personal estate, as it all passed under the wording of the clause set out.

That the legacies to the daughters were payable out of the general personal estate.

Moss, Q.C., for the executors.
Maclennan, Q.C., for Joseph Gilmore.
J. Hoskin, Q.C., for other infants.
Cassels, Q.C., for the widow.
R. Cassels, for some children.
Swayze, for executrix of deceased legatee.

PRACTICE.

C. P. Div. Ct.] [March 12.

McMAHON v. LAVERY.

Jury notice—Legal and equitable issues—C. L. P. Act, ss. 257 and 258.

The plaintiffs sued, as executors of McB., to recover from the defendant, a solicitor, moneys placed in his hands for investment, and notes and money received by him as solicitor and agent for McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set up by way of defence a certain agreement, under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in procuring this agreement, and asked that it might be declared void, and be delivered up to be cancelled.

Held, that the case came within ss. 257 and 258 of the C. L. P. Act, and that the legal issues should be tried by a jury, and the equitable issues by a judge without a jury, unless the judge at the trial, in the exercise of his discretion, chose to try the whole case without a jury; but that the defendant was not entitled as a matter of right to have the jury notice struck out.

Temperance Colonization Society v. *Evans*, *ante* p. 37, followed.

W. H. P. Clement, for the defendant.
Watson, for the plaintiffs.

Wilson, C.J.] [April 1.

WILLIAMSON v. AYLMER.

Taxing officer, powers of—Evidence—Solicitor—Retainer.

The taxing officers have the power to call for evidence on taxations pending before them.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendants until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then, if unable to decide the question of retainer, should report to a judge in chambers.

H. J. Scott, Q.C., for the plaintiff.
Aylesworth, for the defendants.

Rose, J.] [April 2.

IN RE MACFIE v. HUTCHINSON.

Prohibition — Division Court—Attachment of debts—R. S. O. c. 47, s. 125.

The defendant was the medical health officer of the city of London, and his monthly salary as such was attached in a Division Court action in the hands of the city corporation to answer a debt due to the plaintiff. It was claimed by the defendant that $25 of the salary was exempt from attachment under the Division Court Act, R. S. O. c. 47, s. 125, which provides that "no debt due or accruing due to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of, his wages or salary, shall be liable to seizure or attachment under this Act, unless such debt exceeds the sum of $25, and then only to the extent of such excess." No facts were in dispute, and the Division Court judge determined as a matter of law upon the construction of the above section, and of the Public Health Act, 1884, and amending acts, the Municipal Act, 1883, s. 281, and by-law No. 319 of the city of London, that the defendant's salary was not exempt from attachment.

Held, that the decision of the judge could be reviewed upon a motion for prohibition; and

Held, that the defendant was an employee within the meaning of R. S. O. c. 47, s. 125, and that his salary to the extent of $25 was exempt from attachment under that Act.

G. W. Marsh, for the defendant.
Shepley, for the plaintiff.

Rose, J.] [April 2.

HOVEY v. GILBERT.

Discovery — Examination of defendants before statement of claim—Ex parte order.

In an action by creditors of defendant R. to set aside conveyances by him to defendant G. as fraudulent, the plaintiffs swore that it was necessary to have an examination of the defendants before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which they had no personal knowledge, and a local master upon the application of the plaintiffs *ex parte* made an order for such examination.

Held, that the order should not, at any rate, have been made *ex parte*, and that the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim being vastly different, the order should not in this case have been made at all.

C. J. Holman, for the defendants.

Aylesworth, for the plaintiffs.

Boyd, C.] [April 6.

IN RE HAGUE, TRADERS' BANK v. MURRAY.

Costs—Executor—Taxation—Moderation.

Bills of costs for services rendered to an estate after a testator's death down to the date of an order for the administration of the estate were paid by the executor after the order, and pending administration proceedings.

Held, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned, the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors.

Practically, the moderation might be so conducted, if warranted, by special circumstances, as to differ but little from a taxation.

Lefroy, for the plaintiffs, and the Central Bank of Canada.

Reesor, for the executor.

FLOTSAM AND JETSAM.

WE are not surpris d to see some comments in the Press on the sentences inflicted by Mr. Justice Day. Eighteen months' imprisonment of a clergyman for marrying a person who was under age without due publication of banns, penal servitude for life on a boy for attempting to extort money by threats of false accusation, and eighteen months' imprisonment of the young man called Rowden, or Rawden, for falsely publishing in a newspaper that he was engaged to marry a young lady of high rank, are really a group of sentences which must excite amazement in the ordinary mind. Indeed, when we compa·e them with the punishments often awarded by judges for offences complicated with violence, they would appear to be eccentric, and passed with a view to invite the interference of the Home Secretary.—*Law Times.*

ASSISTANT LAW CLERK.—On being informed to-day that Mr. F. A. McCord had been appointed assistant law clerk of the House of Commons, Dr. Richard Wicksteed was much surprised and chagrined. Dr. Wicksteed expected the appointment by right of promotion, and had been given to understand by some of the ministers that his claims would be duly considered. For many years Dr. Wicksteed has filled the position of second assistant law clerk, and confidently expected to succeed Mr. Wilson. Some time ago the Minister of Justice stated that a Nova Scotia lawyer, a protégé of his own, was an applicant for the position, but on learning that a thorough knowledge of the French language was necessary, he withdrew from the contest, receiving a solatium in the shape of a job of preparing an index to the revised statutes, for which he is to receive probably $1,000. Dr. Wicksteed regards the appointment of Mr. McCord over his head as an act of gross injustice which will not do the Government any good, and for which they will be taken to task when Parliament meets. The doctor, like many others, is being made to feel the influence of the Chapleau faction, as the Secretary of State, who is now all powerful in the Government, could not refuse to secure a good position for the son-in-law of his old colleague and treasurer, Judge Wurtele.—*Ottawa Free Press.*

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DIARY FOR MAY.

1. Sun..... *3rd Sunday after Easter.*
2. Mon .....Sittings of Supreme Court Canada begin. J. A. Boyd, 4th Chancellor, 1881.
3. Tues.....First intermediate examination.
5. Thur.....Second intermediate examination.
7. Sat.....Lord Chancellor Brougham died, 1868, æt. 90.
8. Sun.....*4th Sunday after Easter.*
10. Tues.....Sittings of Court of Appeal and of Co. Ct. York for trials begin. Solicitors' examination.
11. Wed .....Barristers' examination. Batoche, 1885.
15. Sun. .....*5th Sunday after Easter.*

TORONTO, MAY 1, 1887.

THE pressure of the prolific Canuck, guided doubtless by the astute, far-seeing ecclesiastical power whose iron grip (like the "maiden" of the Inquisition) is closing on the Anglo-Saxon race, is apparently being felt by our contemporary, the *Legal News*. Its first number this month has one of its editorials in the French language, and all its editorials in the number for April 16th are in that language. So far as we have observed this is a new departure, and though it is a small matter whereon to found an argument, it is said that straws show which way the wind blows.

THE same journal says another movement is being made towards an increase of the judges' salaries, and that deputations of the Bar, both of Ontario and Quebec, are in communication with the Minister of Justice on the subject. We always understood that the great difficulty of obtaining this increase in Ontario was the fact, that if the increase were made here (the propriety of which was admitted) the Government would be compelled to make an increase, not only for the Court of Queen's Bench in Quebec, but also for all the so-called Superior Court judges in that Province. It is said that, considering the character and importance of the work of the latter class, occupying, as they do, positions very similar to our County Court judges, their remuneration is ample. If their salaries are increased, much more ought those of the County Court judges here, many of whom have much heavier work to do. We doubt, however, if the heavily taxed people of Ontario would submit to the additional burden that would be thereby thrown upon them. They practically would have to foot the bill. If it could be arranged that each Province should pay its own judicial salaries it would probably result in those of this Province being increased and those in Quebec reduced.

THE honour of Knighthood has been conferred upon Hon. Matthew Crooks Cameron, Chief Justice of the Common Pleas. The profession are always well pleased to hear of any distinction being conferred upon that gifted and true hearted gentleman, whose name is a synonym for honour and integrity. Some surprise has been expressed that the Chiefs of the other Divisions of the High Court of Justice, and the Chief Justice of the Court of Appeal, have not been similarly honoured. The degree of Knight Bachelor was also, we understand, offered to them, but declined, for reasons personal to themselves. Whether there was in their minds any fear of the usual democratic chaff at the further multiplication of the word "Sir" in this country, we have no means of knowing. Sir M. C. Cameron at least has (as he always had) the courage of his convictions, and we

respect him accordingly. The title was presumably offered to the gentlemen referred to by reason of their official position, and as an honour to the Courts over which they preside. At the same time it is quite reasonable that if they prefer not to have any such distinction, their wishes should be respected, and they should be free from any charge of want of respect to the powers that be. There is plenty of precedent for their declining the honour. Item—Wherein, so far as the subjects of Her Majesty are concerned, lies the difference between the word "Sir" and the word "Honourable" as a prefix, except in the matter of degree? Yet a person accepting the latter escapes the criticism which sometimes falls upon him who allows himself to be called the former.

RECENT ENGLISH DECISIONS.

Practice—Third party procedure—Indemnity.

Birmingham and District Land Co. v. *London and North-Western R'y Co.*, 34 Chy. D. 261, is a decision of the Court of Appeal on a point of practice. According to the English Rules the leave of the court must be obtained before a notice can be served on a third party, from whom the defendant claims indemnity. In this Province the notice may be served without leave, but the party served may move to set it aside, and on such a motion the point decided in this case would be an authority. Chitty, J., held (and the Court of Appeal affirmed his decision) that it is not enough for a defendant to say that he claims indemnity from the third party he wishes to serve; but he must show that he has a *prima facie* claim against him for indemnity under a contract express, or implied, or that he has a right thereto on some equitable principle, although the court will not on a motion for leave to serve the notice, determine finally whether the claim is well founded or not. In the case in hand the facts alleged, only showed that the defendants might have a claim for damages against the third parties, and leave to serve the notice was refused. It is well to note, however, that the English Rules of 1883 are more restricted than Ont. Rule 108, the former confining the right to serve the notice on a third party to cases where contribution or indemnity is claimed, whereas the Ont. Rule allows it to be served, not only in that case, but also where "any other remedy or relief" over is claimed.

An application was subsequently made to the court to allow the case to be reargued on the ground that a clause in a Statute had been overlooked in the former argument of the case; but the court refused to accede to the application on the ground that the decision was on a mere point of practice, and the Statute was not so clearly in point that there could be no argument on the question.

Principal and agent—Action for production of documents in agent's possession.

Dadswell v. *Jacobs*, 34 Chy. D. 278, was an action brought by a firm of foreign merchants against their agent in England, claiming production of documents relating to their business to a person appointed by them for that purpose. The defendants put in a defence stating that the person appointed by the plaintiffs was a clerk in a rival and unfriendly house of business, for which reason they objected to produce the documents in question to him, but that they were willing to produce them to any proper person, and it was held by the Court of Appeal (affirming Chitty, J.) that this was a good defence; and the court refused to strike out the defence, and give judgment for production to the plaintiffs, or their agents generally, without hearing the evidence.

Company—Preference shareholders—Reduction of capital—Injunction.

Bannatyne v. *Direct Spanish Telegraph* Co., 34 Chy. D. 287, raises, as Cotton, L.J., says, a very important question. The defendant company, which was formed in 1872, had a capital of £130,000, with power to add to that capital by issue of new shares, and with power to give preference to any new shares that might be thus created. All capital raised by new shares was to be considered part of the original capital. In 1874 resolutions were passed to increase the capital by 6,000 new

shares of £10 each, and those shares were to have a preferential dividend of 10 per cent., but no preference as regards capital. The company afterwards lost one of their cables, thus losing a considerable part of their capital. Resolutions were then passed that they should reduce their capital by reducing the amount of both the ordinary and preference shares one-half. A preferential shareholder brought the action for an injunction to restrain this reduction of capital so far as the preferential stock was concerned, and an injunction was granted by Bacon, V.C.; but on appeal the Court of Appeal reversed his decision, holding that the contract to pay a preferential dividend did not preclude the right to reduce the capital created by the new shares, and did not amount to a bargain to pay an annuity of £6,000 in respect to the whole of the preference shares, but simply to pay a preferential dividend on the amount of those shares—whatever it might be—the new capital being subject to reduction in like manner as the original capital.

On a subsequent application, *In re Direct Spanish Telegraph Co.*, reported at p. 307, Kay, J., confirmed the resolution for reduction.

PRACTICE—PARTNERSHIP ACTION—DISSOLUTION—JUDGMENT CREDITOR OF PARTNERSHIP.

In *Kewney* v. *Attrill*, 34 Chy. D. 34, after a judgment had been pronounced in the Chancery Division for a dissolution of a partnership, and appointing a receiver, a creditor obtained judgment in the Queen's Bench Division against the firm. An application was then made in the Chancery action by the judgment creditor for leave to issue execution, but, instead of granting leave to issue execution, Kay, J., gave the execution creditor a charge for his debt and costs on all the moneys then in the hands of, or which might be thereafter taken possession of by, the receiver, the execution creditor undertaking to deal with the charge according to the order of the court.

PRACTICE—ADMINISTRATION ACTION—ABSENT PARTIES.

In *May* v. *Newton*, 34 Chy. D. 347, Kay. J., was called on to consider the practice of the court as to binding absent parties in an administration action. The result of his examination of the practice may be best stated in his own words. He says at p. 350:

The effect of all these rules is that persons interested in the property which is being administered, and whose rights or interests may be affected by an order directing accounts or inquiries are not bound—at any rate when they ought to be served with notice of such order—unless they are so served, or unless such a representation order is made as I have mentioned (i.e., an order appointing one person of the class to which the absent person belongs to represent that class). If service upon them is dispensed with, or if under Ord. xvi. r. 46, the court proceeds in the absence of any one representing them, they are not bound.

WILL—WILLS ACT S. 15 (R.S.O. C. 106 S. 17)—VOID LIFE INTEREST—ACCELERATION.

In re Townsend, Townsend v. *Townsend*, 34 Chy. D. 357, is a decision upon the effect of the Wills Act s. 15 (R.S.O. c. 106, s. 17). A gift of real and personal estate was made by a testator upon trust to convert and pay the income of the proceeds to A. for life, after his death to pay the capital and income to A.'s child or children, with gifts over, in case A. died without leaving issue living at his death. The gift in favour of A. was void because the will was attested by his wife, and A. had no children, and the question was: What was to be done with the income of the fund, which was the proceeds of realty only? And Chitty, J., held that until A. had a child the gifts upon the determination of his life estate could not be accelerated, and that during the life of A., and so long as he had no children, the income of the trust fund was undisposed of and belonged to the testator's heir-at-law, and could not be accumulated for the benefit of those entitled in remainder.

WILL—GIFT DURING WIDOWHOOD—GIFT OVER ON DEATH.

Stanford v. *Stanford*, 34 Chy. D. 362, is another decision of Chitty, J., upon the construction of a will whereby the testator gave the residue of his real and personal property upon trust for his widow during her life, provided she remained a widow; and from and after her death or remarriage he gave such residue to B., absolutely. In the event (which happened) of B. dying during the life of the widow, the property was given over to the testator's brothers and sisters, who should be living at the widow's death. B. died an infant and the widow married again, and it was held that upon such remarriage the gift over in favour of the testator's brothers and sisters took immediate effect and was not postponed until the widow's death.

Recent English Decisions.

Rectification of agreement—Specific performance.

The short point determined by North, J., in *Olley* v. *Fisher*, 34 Chy. D. 367, is that since the Judicature Act, 1873, the court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action, to rectify a written agreement upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed.

Vendor and purchaser—Conditions of sale—Interest.

In *Riley* v. *Streatfield*, 34 Chy. D. 386, an application was made to North, J., under the Vendors and Purchasers Act, to construe the rights of the parties as to interest on the purchase money. The conditions of sale provided that the purchaser should pay interest from the day fixed for completion in case of delay from any cause, "except the wilful neglect or default of the vendor." A delay not attributable to the wilful neglect or default of the vendor, took place, and the purchasers, by agreement with the vendor, deposited the purchase money with a banker "without prejudice as to any question of interest," and it was held by North, J., that this deposit of the money did not relieve the purchaser from his liability to pay interest.

Principal and agent—Purchase of mine by syndicate—Resale to a company—Secret profit—Promoter.

The case of *Ladywell Mining Co.* v. *Brookes*, 34 Chy. D. 398, was an action brought to compel the vendors of property sold to the plaintiff company to account for a profit made by them on the sale. The action was dismissed by Stirling, J., on the ground that the evidence failed to show that the vendors, at the time they bought the property, were promoters of, or in a fiduciary position to the company.

Further assurance—Tenant in tail.

Bankes v. *Small*, 34 Chy. D. 415, is the only remaining case in the Chancery Division. This was an action to compel the defendant to specifically perform a covenant for further assurance. The defendant being tenant in tail in remainder, had, without the concurrence of the tenant for life, executed a disentailing deed, whereby his estate was converted into a base fee in remainder; he then sold the remainder to the plaintiff, covenanting that he would execute every such disentailing and other assurance for further or more perfectly assuring the premises as the purchaser should reasonably require. The tenant for life having died, the plaintiff applied to the defendant to execute a further disentailing deed, which being refused, the action was brought. Kekewich, J., held the plaintiff entitled to the relief claimed.

Bankruptcy—Mortgagee of policy—Valuation of security.

In *Deering* v. *Bank of Ireland*, 12 App. Cas. 20, the House of Lords reversed the decision of the Irish Court of Appeal, and held that where a mortgagee of a life policy having on the bankruptcy of the mortgagor valued his security and proved for the difference against the bankrupt's estate, he could not afterwards make a further claim for the value of the covenant to pay premiums.

Company—Lien of company on shares—Mortgagee of shares.

The case of *The Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29, was originally before Field, J., 29 Chy. D. 149, (see *ante* vol. 21, p. 268), his decision was subsequently reversed by the Court of Appeal (31 Chy. D. 19). The House of Lords now reverse the latter court, and restore the judgment of Field, J. The question was one of priority between a company, who by virtue of their articles of association, claimed a lien on the shares of a share holder for a debt due by the shareholder to the company, and a mortgagee of the shares. The House of Lords held that the company could not, in respect of moneys which became due from the shareholder to the company after notice of the mortgage, claim priority over advances made by the mortgagees after such notice. The principle laid down in *Hopkinson* v. *Rolt*, 9 H. L. C. 514, being held to be applicable. Their lordships also held (reversing the Court of Appeal), that the notice of the mortgage was not a notice of a trust.

Mortgagee under deed absolute in form—Subsequent incumbrance—Priority.

In connection with the foregoing case it will be useful to consider the *Union Bank of Scotland* v. *National Bank of Scotland*, 12 App. Cas. 53, in which, divested of the jargon of Scotch legal phraseology, the facts appear to have been as follows: The National Bank were mortgagees of certain property under a deed which was absolute in form. The mortgagor subsequently assigned her equity of redemp-

tion by way of mortgage to the Union Bank for value, and the question was whether the National Bank could hold the mortgaged property as security for advances made by them subsequent to their receipt of the notice of the mortgage to the Union Bank. The Scotch courts held that they could, but the House of Lords held that the principle of *Hopkinson* v. *Rolt*, 9 H. L. C. 514, governed, and therefore reversed the decision.

NEGLIGENCE—RAILWAY CO.—ONUS OF PROOF.

Wakelin v. *London and South Western Ry. Co.*, 12 App. Cas. 41, was an action by a widow, under Lord Campbell's Act, to recover damages for the death of her husband, who was run over by the defendants' train, and shows the difficulties that lie in the way of suitors under such circumstances. The defendants' line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman held guard during the day, but was withdrawn at night. The dead body of the plaintiff's husband was found on the line near the level crossing at night, having been killed by a train which carried the usual head light, but did not whistle or give other warning of its approach. No evidence was forthcoming to show how the deceased got on the line. Under this state of facts it was held by the House of Lords (affirming the Court of Appeal), that even assuming there was evidence of negligence on the part of the company, there was no evidence to connect such negligence with the accident, and that, therefore, the plaintiff failed.

In giving judgment their lordships, however, dissented from the view of the Master of the Rolls, that it was incumbent on the plaintiff, not only to establish that the accident was occasioned by the negligence of the defendants, but also to give affirmative evidence that the deceased did not negligently contribute to the accident. The burthen of proving contributory negligence on the part of the deceased, their lordships thought lies, in the first place, on the party who alleges it.

PRACTICE—APPEAL ON THE FACTS.

Allen v. *The Quebec Warehouse*, 12 App. Cas. 101, was an attempt on the part of the appellants to induce the Privy Council to reverse the decision of the court below on the facts. The action was brought against the defendants for damage to the plaintiff's ship which was injured owing, as was alleged, to a post on the defendants' wharf, to which it was moored, giving away. The court below dismissed the action. The defendants had brought a cross action for damage to the wharf, but this action had also been dismissed, and there was no appeal. Their lordships came to the conclusion that notwithstanding there had been these diverse findings of fact, yet they could not on appeal decide the case upon the view they would have taken of the facts if they had been a court of first instance, but that their decision must depend on whether or not they could say that it had been established that the judgment of the court below was clearly wrong. The appeal was dismissed.

PRACTICE—CONSOLIDATION OF APPEALS.

In *Heddingh* v. *Denyssen*, 12 App. Cas. 107, the Privy Council on motion consolidated the appeal with two other appeals arising out of the same will, but in a suit which had not been instituted until a year after the first appeal had been admitted; The appeals involving the same subject matter, and it appearing that there would be a saving of expense if they were heard together.

SALVAGE—REDUCTION OF SALVAGE ALLOWED.

The Owners of the Allen v. *Gow*, 12 App. Cas. 118, was an appeal in an admiralty case as to the quantum of an allowance for salvage. The judicial committee reduced the amount from $12,000 to $7,600.

PRACTICE—FOREIGN JUDGMENT—DEBTOR'S TRUSTEES—INTEREST ON JUDGMENT.

Hawksford v. *Renouf*, 12 App. Cas. 122, was an appeal from the Royal Court of Jersey to the Privy Council. The plaintiff who had recovered a judgment in England, sued on the judgment in Jersey, and joined as defendants the judgment debtor and certain persons who held property for him as trustees. The Jersey Court gave judgment in favour of the plaintiff for the amount of the judgment and interest thereon from its date, at 5 per cent., against all the defendants. The defendants appealed, and the judicial committee held that the trustees were improperly joined as defendants, and reversed the judgment as against them; and reduced the amount of it as against the judgment debtor by the costs occasioned by adding the trustees, and also reduced the inter-

est allowed on the judgment debt from its date, until the entry of judgment in the Jersey Court —from 5 per cent. to 4 per cent.—the rate recoverable thereon according to the law of England.

INSURANCE OF CARGO—"AT AND FROM PORT"—COMMENCEMENT OF RISK—INSURABLE INTEREST.

In *Colonial Insurance Co.* v. *Adelaide Marine Insurance Co.*, 12 App. Cas. 128, the judicial committee determined some questions of insurance law. The plaintiffs proposed to the defendant to insure a wheat cargo "at and from" port, and the defendants "in accordance with your written request" granted an insurance "from port." It was contended that the parties were not *ad idem*, and consequently there was no contract of insurance. The judicial committee, however, held that the defendants intended by their acceptance to insure "at and from" port. The insurance related to wheat then on board or to be shipped on board the vessel named, and it was held that the risk commenced as soon as any portion of the cargo was on board. The plaintiffs were both the charterers of the vessels and the purchasers of the cargo insured, and the master from time to time received delivery from the vendors; and it was held that this was a delivery from time to time to the purchasers, so as to vest in them a right of possession and property, and that consequently they had an insurable interest in such part of the wheat as had been so delivered. Their lordships took occasion to remark, that it was most desirable that colonial judges should comply with the Rule of the Privy Council of 10th Feb., 1845, requiring them to state their reasons for their judgments.

PUBLIC SQUARE—BREACH OF CONDITION—RIGHT OF ENTRY.

The case of *Chevrotiere* v. *Montreal*, 12 App. Cas. 149, was an appeal from the Superior Court of Quebec. Certain land had been granted in 1803 to the magistrates of Montreal, subject to a condition that the grantors, their heirs and assigns, should have a right to reenter if it should be turned to other uses than that of a public market place. The rights of the magistrates subsequently became vested in the municipal corporation, and in 1847 the market which had theretofore existed was abolished, and the land was thenceforward used as an open public place. The plaintiff, who claimed to be the owner of about seven-eighths interest as assignor of the original grantors, sought to recover the land under the condition, or a money compensation in lieu thereof, of $180,866. The council, however, affirmed the decision of the Superior Court and dismissed the action.

PARTNERSHIP—WINDING UP—PROFITS ACCRUED TURNED INTO CAPITAL—DISTRIBUTION OF ASSETS.

Certain questions relating to the law of partnership were considered by the Privy Council in *Binney* v. *Mutrie*, 12 App. Cas. 160. In keeping their accounts partners had treated their shares of accrued profits each year as accretions to their capital. It was held by their lordships that the profits of the year ending with the dissolution of the firm could not be so treated; and further, that the surplus assets should be distributed by paying to each partner his claims in respect of capital standing to his credit at the dissolution, and that the residue or deficiency would be profits or losses divisible in either case in the agreed proportions, and that the rateable application of the surplus assets in payment of capital claims must be subject to the liability to contribution to make up the deficiency, if any, and to the claim of any of the partners against the entire assets to answer such deficiency.

EXECUTOR—SALE BY EXECUTOR TO HIMSELF—SUIT BY LEGATEE TO SET ASIDE PURCHASE BY EXECUTOR.

The only remaining case to be noted is *Beningfield* v. *Baxter*, 12 App. Cas. 167. B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm. B.'s executor joined in the sale, and also became the purchaser of the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee. This suit was brought by the widow to set aside the sale, and it was held that the sale was voidable, and that the plaintiff was not barred by delay or acceptance of money on the ground of either ratification, acquiescence or laches; but it was held that the decree for administration of B.'s estate, though declaring the sale should be set aside, should be without prejudice to its being shown, on taking the accounts, that any creditor was disentitled to the benefit thereof by estoppel or otherwise.

REPORTS.

ONTARIO:

MUNICIPAL CASES.

COUNTY COURT OF LINCOLN.

SPENCE V. CITY OF ST. CATHARINES.

By-law for destroying dogs—Municipal Act, 1883, *sec.* 49, *ss.* 12, 13.

Defendants held responsible for the act of the policeman who shot a dog under the authority of a by-law for the destruction of dogs roaming at large, not having on a specified tag or plate.

The purchase of the plate does not protect the dog unless it is worn.

A dog following its owner cannot be said to be wandering about at will, or to be roaming or running at large.

Discussion as to the object of the Legislature in reference to the provisions of the Act.

[St. Catharines—Dec. 29, 1886.

This was an action brought to recover damages sustained by the plaintiff in consequence of a cocker spaniel dog belonging to him having been shot by a policeman of the defendants, on the 6th August, 1885.

A by-law, called "By-law relating to Dogs," was passed by the municipal council of the corporation of the city of St. Catharines on the 23rd June, 1879, by the second section of which it was enacted that the owner, possessor or harbourer of any dog or bitch within the city shall pay a yearly tax to the city of one dollar for every such dog, and two dollars for every such bitch.

By the 4th section it was enacted that every owner of a dog or bitch in the city shall annually on or before the 1st August in each year procure the same, to be registered, numbered, described and licensed for one year from the 1st January next, thereafter ensuing, in the office of the general license inspector of the city, and shall cause the said dog or bitch to continually wear around its neck a collar bearing the name of the owner legibly written, stamped or engraved thereon, to which collar shall be attached a metallic plate having raised or cut thereon the letters C. L. P. (city license paid) St. Catharines, and the figures indicating the year for which the license has been paid, which said metallic plate shall be furnished by the inspector at the expense of the city, and further provides that the owner shall pay 25 cents for the license and metallic plate as a fee to the inspector for such registration and metallic plate; provided that no license shall be issued to any person, unless such person shall have paid first the yearly tax of the then current year to the collector of taxes, and produced the receipt of the collector therefor to the said inspector.

By the 5th section, it was enacted that "no dog or bitch shall be permitted to roam at large in the city without the collar and metallic plate, mentioned in the preceding section, and any dog or bitch running at large contrary to this by-law may be forthwith destroyed by the police of the said city."

The 6th section made provisions for Justices of the Peace ordering dogs that have attacked persons travelling in the street, or done any damage, or that have by barking or howling or in any other way disturbed the quiet of any person, to be destroyed.

The 7th section authorized the Mayor on being satisfied that there is danger to the citizens from mad dogs to give notice enjoining all persons in the city to confine their dogs and bitches or muzzle them for a period not to exceed two months from publication of the notice.

The 8th section authorized the killing of dogs or bitches known to be rabid.

The plaintiff was shown to have been the owner of a cocker spaniel on the 26th August, 1885, and to have owned it some time previously. He had paid the tax on the dog and had also had him registered and had obtained a tag or metallic plate, as required by the by-law, but owing to the collar which had been on the dog having been stolen or lost, the tag had not been attached to the dog. On the 26th August, 1885, the dog accompanied the plaintiff's little daughter and some other children, who had left the plaintiff's house on James Street, St. Catharines, and had gone along St. Paul Street in a westerly direction. When the children had gone nearly as far as Ontario Street, they stopped to look into a shop window on St. Paul Street, and the dog ran on, and while running about at or near the intersection of St. Paul and Ontario Streets Thomas Dow, a policeman of the city, who was walking along Ontario Street with a gun looking for dogs running at large without the metal plate came across the dog, and shot and killed it. The dog, at the time it was shot, was on the crossing leading from St. Paul Street across Ontario Street, near the west side of Ontario

Street, and, according to the evidence, had crossed to the west side, and was running on the crossing at the time it was shot.

Dow was, at the time he shot the dog, specially on duty for the purpose of shooting dogs which were without metallic plates, being appointed to that duty by the Chief of Police, and had in his possession a gun belonging to the defendants, and was followed by another man with a waggon, in which the dogs shot by him were put and carried away.

The statute under which the by-law was passed was R. S. of O. cap. 174, sec. 461, sub-sec. 10 & 11, which read as follows: 461. The council of every township, city, town or incorporated village may pass by-laws.

10. For restraining and regulating the running at large of dogs, and for imposing a tax on the owners, possessors or harbourers of dogs,

11. For killing dogs running at large contrary to the by-laws.

These sections are the same as in the act now in force, the Con. Mun. Act, 1883, sec. 490, sub-sec. 12 & 13.

It was not shown, or even suggested, that any proclamation had been issued by the Mayor under the 7th section of the by-law enjoining all persons in the city to confine their dogs or keep them muzzled, as can be done by the Mayor when he is satisfied there is any danger to the citizens from mad dogs; but the right to kill the dog is rested on the 5th section which enacts that "No dog or bitch shall be permitted to roam at large in the city without the collar and metallic plate mentioned in the preceding section, and any dog or bitch roaming at large contrary to this by-law may be forthwith destroyed by the police of the city."

SENKLER, Co. J.—In the case of *McKenzie* v. *Campbell*, 1 U. C. R. 241, the question arose whether under 4 Will. IV., cap. 23 (incorporating the city of Toronto) by sec. 22 of which power was given to the Mayor and Aldermen to make laws to prevent and regulate the running at large of dogs, and to impose reasonable tax upon the owners or possessors thereof, a by-law could be passed authorizing the Mayor to issue his proclamation requiring the owners of dogs to keep them confined for a period in his discretion, and that upon such proclamation being issued it should be lawful for the high bailiff, constables or any inhabitant of the city to shoot any dog running at large until the time limited in the proclamation should expire, and it was held that it could.

The act did not in terms authorize the killing of dogs, but it was held that for the purpose of preventing and guarding against hydrophobia, such a by-law might be passed.

A long judgment was rendered by Chief Justice Robinson, in which he points out that the act of killing the dog was an act of precaution for preventing an impending evil, or perhaps even an act for removing a present evil, and not a punishment for disobedience of the by-law, in which case he intimates that it might be illegal on the ground that other modes of punishment were provided in the Act (see page 248).

In the present case the killing the dog was not done in pursuance of any proclamation occasioned by fear of hydrophobia, under the 7th section, as already pointed out, but under the 5th section of the by-law, and can only be regarded as a punishment for not having the metallic plate attached.

The statute, however, now expressly empowers the killing of dogs running at large contrary to the by-law, and gives this power generally, and does not limit it to cases of apprehension of hydrophobia, so that the question considered in *McKenzie* v. *Campbell* does not arise.

The council have used the words "roam at large" instead of "run at large," the words used in the statute, in the first part of the 5th section of the by-law. No argument was based on this by the counsel for the plaintiff; it must, however, be shown that the justification comes within the words of the by-law. Under the circumstances it seems to me that that the only question to be considered is whether the dog can be said to be roaming at large at the time it was shot; the fact that the tax had been paid and the collar and plate procured cannot avail so long as the latter were not on the dog.

The dog was, at the time, accompanying the plaintiff's daughter along the street; it did not keep close to her heels and was not under any confinement or restraint, but the evidence shows, frequently ran a number of yards from her, as dogs will do while accompanying their owners, and the girl having stopped at a shop window, the dog ran on and crossed Ontario Street, and then came back, and seems to have been crossing again when shot. It was proved the dog was in the habit of following the little girl, and in fact was obtained by the plaintiff for her, and would only follow her.

It was urged by the plaintiff that the dog could not be said to be running at large under these circumstances, but that only dogs that were running about without their masters or members of the master's family could be so considered.

For the defendant it was contended that a dog's running at large when it is off its master's

premises, whether any one is with it or not, or at all events unless the person with it has it under his actual control.

Although the statute authorizing the passing of these by-laws has been in force for many years and many by-laws must have been passed under it, I have not been referred to nor have I discovered any case in the Canadian or English reports where the meaning of the words "run at large" or "roam at large" has been considered when applied to dogs.

Several cases can be found under the Act against horses or cattle being at large upon any highway within half a mile of any railway unless in charge of some person to prevent their loitering or stopping at the intersection (20 Vict., cap. 12, sect. 16). See *Cooley* v. *G.T.R. Co'y*, 18 U. C. R. 95; *Markham* v. *G.W.R. Co'y*, 25 U. C. R. 572. In these great stress was laid on the necessity of the animals being in charge of some person, and upon the object of public safety contemplated by the Legislature. In the case of *Hillyard* v. *G.T.R. Co'y*, 8 Ont. R. 583, it was held that a colt which was injured by a wire fence of defendants could not be said to be running at large, as it was following its dam, which was being led by a man with a halter along the road, as that is the customary way, and the universal custom ought to give the rule.

I have found some cases in the American reports, but they do uot appear to be uniform. The Vermont statute permits any one to kill a dog running at large off the premises of the owner or keeper without a collar with the owner's name on it. In *Wright* v. *Clark*, 5 Vt. 130, a fox-hound kept for the chase and chained when not in the pursuit of game, was chasing a fox with its owner and one Stone, and while at some distance from its owner, but near and in full view of Stone, was killed by the defendant in shooting at the fox, it was held the shooting was wrongful and the defendant liable.

It was held that the hound when pursuing the deer or fox, at or with its master's bidding, is not "strolling without restraint," or "wandering, roving or rambling at will."

In the case of the *Commonwealth* v. *Don*, 10 Mit. 382, the defendant owned a dog which was not licensed. It left defendant's store (where he was usually kept chained) with a clerk of the defendant's, and followed said clerk through the streets of the town, not being confined, and following the clerk generally at a distance of from two to three rods, and was usually under the control of the clerk, and obedient to his call.

The judge instructed the jury that "if upon the facts of the case they were satisfied that the dog was by the side of the owner, or of his servant having the especial charge of him, or was so near to him that he might be controlled and prevented from doing mischief, although he was not tied, he was not in point of law at large; but if they were satisfied he was following through the streets his master or the clerk of his master loose, and at such a distance as that such control could not be exercised as would prevent mischief, he was at large within the meaning of the law.

The defendant having been found guilty, the Court of Appeal held that the instructions were sufficiently favourable to the defendant.

The by-law in that case used the words "go at large."

A dog playing with its owner's son on the owner's premises is not at large: *McAneaney* v. *Jewett*, 10 Allen 151.

Several cases considering the meaning of the words "at large" when applied to other animals, are collected in Browne's Judicial Interpretation at page 373.

The construction put upon them seems to vary according to the object the Legislature had in view in passing the enactment in which they are used.

I think there can be little doubt that the chief object the Legislature had in view in passing the enactment in question was to enable measures to be taken to prevent and guard against hydrophobia. It is not so stated in the Act, but as said by Chief Justice Robinson in *McKenzie* v. *Campbell*, 1 U. C. R., at p. 244, "we cannot but know that the principal object of restricting dogs from running at large in a city is the consideration of the imminent danger to the community of the horrible affliction of hydrophobia spreading to a fatal extent and with great rapidity, unless instant measures are taken to prevent it. It is not that dogs are likely to commit injuries to fields and gardens such as may be apprehended from cattle or swine, nor that they are in the same sense a nuisance on account of their making the streets unclean and offensive, for we see when there is not the particular danger alluded to, which cannot be too much dreaded, and which by mankind in general is indeed regarded with almost superstitious terror, it is common to find dogs allowed to wander about towns at will, though possibly there may be exceptions to this in the general regulations of some very populous cities—we are at liberty then to infer, and I think we must judiciously recognize that one object at least, if not clearly the greatest or the only object the Legislature had in view, when they allowed the Mayor and the Commonalty to prevent and regulate the running at large of

dogs, was to protect the lives of the inhabitants against a danger which might be most urgent; this being so we must look at the regulation with this consideration in our minds."

When, however, we look at the by-law now under consideration, we see that although by the 7th section, provision is made for the Mayor by proclamation enjoining all persons to keep their dogs confined or muzzled in case of apprehension of danger from hydrophobia, for a certain time, no provision is made for the killing of dogs that may be found running at large unmuzzled, contrary to the proclamation, unless it can be held that the words "contrary to this by-law," in the 5th section make such provision, a construction difficult to support in the face of the earlier part of that section which refers solely to dogs running at large without the metallic plate and collar, and it seems equally doubtful whether any pecuniary penalty is imposed in such a case.

The by-law seems to me very inefficiently drawn as a protection against hydrophobia, the object aimed at in it seems to be merely the enforcement of the payment of taxes by the owners of dogs.

However reasonable it may be to authorize the immediate destruction of dogs running at large in contravention of proclamations for the prevention of hydrophobia (although even in that case Chief Justice Robinson points out that it would be better to pay some kind of respect to private rights, and give the owner some opportunity of reclaiming his property (1. U. C. R. at p. 249); it does certainly seem harsh to authorize such a procedure, when no such proclamation has been issued, merely as a means of enforcing a police regulation, for which enforcement ample provision is made by the by-law through the imposition of fines. The injustice that may be thus done is illustrated by the present case, where the violation of the law is simply technical and not real, the plaintiff having paid all the taxes, and the omission to have the metallic plate attached being the result of an accident.

Such a procedure entirely disregards all rights of property, and if a mistake is made no chance remains for remedying it.

Assuming, however, that such an enactment as contained in this by-law is within the purview of the Act, the facts must be shown to come within the fair meaning of the words of the by-law.

The Council have chosen to use the word "roam" in their by-law, and this word may narrow, although it cannot extend, the meaning of the word in the Act which is "run" at large.

I do not, however, see that there is any appreciable difference in the two words. I think that both mean "wandering about at will," to adopt the expression made use of by Chief Justice Robinson in the passage I have already quoted, and I cannot think that a dog following its owner or other person having charge of it, can be said to be wandering about at will, or to be roaming or running at large—its general course is governed by its master, although it does run backward and forward while accompanying him, and it is controlled by his will. I am therefore of opinion that the justification fails.

It was further objected that the defendants were not responsible for the acts of the policeman Dow, on the ground that he was appointed by the Police Commissioners, and also that he was only authorized to act within the scope of the by-law. Although, no doubt, Dow was appointed by the Commissioners (as all policemen are), he is a policeman of the city and paid by the defendants, and in what he was doing in this case, he was acting by order of the Chief of Police, and as he supposed under the authority of a city by-law passed by defendants' council.

The Act was one which might be within the authority of the by-law, and I am of opinion the city is responsible for it.

Then as to the value of the dog, the evidence on this point is not satisfactory. The animal is said to have been a cocker-spaniel. These dogs sometimes have a fancy value, either because they are of a particular strain of blood, or because they are well trained. There is no evidence that this dog came from a valuable strain, and but little evidence that he was well trained—he was not kept for hunting purposes, but as a house dog.

In my opinion $20 is a fair value for the dog, and I give judgment for the plaintiff for $20 with Division Court costs; no right of set-off to be allowed the defendants. I stay the entry of judgment for one month.

I would add that I think the mode of destroying dogs in this city most improper; it is not only in disregard of the rights of property, but the act of a policeman shooting a dog in the day-time in the public streets is one full of danger, not only from the risk of the bullets glancing, but as likely to frighten horses; and the sight of a wounded dog striving to escape while scarcely able to move, and its cries of distress are painful in the extreme, and should not be met with in public thoroughfares.

The by-law clearly requires amendment, and when this is done, I trust that some less arbitrary and more humane system of carrying out its provisions will be adopted.

THE LINE FENCE'S ACT.

THOMAS v. RENNIE.

Excess of authority by fence viewers—Setting aside award.

The fence viewers having awarded that the appellant should remove a line fence already existing and sufficient, and replace it by another, the nature and cost of which they prescribed.

Held, that they exceeded their authority, and the award was set aside with costs.

[Whitby, December 22nd, 1886.

The parties were owners of adjoining lands in the Township of Brock. They and the former owners of the land had, for some years, by mutual agreement, kept up one-half of the line fence between their lands. The appellant's portion consisted of cedar stumps and roots, built up into a fence. The evidence showed that it was reasonably fit to keep out cattle, and that similar fences were largely erected and maintained in the locality. The respondent, having erected a new fence upon his portion, called upon the appellant to remove his stump fence and erect one similar to his own. Upon Thomas' refusal he called in the Fence Viewers, who made an award in accordance with Rennie's demands. It was shown, on appeal, that apart from the cost of a new fence, the removal of the old fence would be both tedious and expensive.

DARTNELL, J.J.—Section 2 defines the duties of owners, and imposes upon such as are owners of adjacent lands the duty of keeping up a just proportion of the fence which marks the boundary between them.

By Section 3 it is provided that if such owners cannot agree, and there is a dispute between them respecting such proportions (that is, the just proportion spoken of in section 3), the aid of the Fence Viewers can be invoked in order to arbitrate in the premises; that is, to settle the just proportion.

There is nothing in the Act which seems to point out that it applies to any existing line fences. On the contrary, it appears to me only to apply where circumstances require the erection of a fence where none previously existed. The form of award given by the Act confirms this view, for it speaks of a fence to be made and maintained. The necessity may arise from a variety of circumstances, such as the clearing of bush land, or the sale of a portion of a lot, which would entail the erection of a line fence where none existed theretofore.

It might be that such a modification of surrounding circumstances would arise as to cause an agreement for the proportion of an existing fence which would be just at one time not be so later on. In such case, perhaps, the dispute could be adjusted by the Fence Viewers; but not so in this instance. Rennie does not complain of the proportion, but that Thomas' fence is an eyesore to him; that his sheep might be injured in attempting to jump over it; and that it tended to gather noxious weeds, etc. The answer to this is that the fence existed when he bought, and it was purchased with full knowledge of its nature and form.

I am clearly of the opinion that the Fence Viewers had no authority to make the award they did: that it should be set aside; and as Rennie persisted in his proceedings after notice of Thomas' objection to their jurisdiction, he should be ordered to pay all costs of the appellant.

DOMINION ELECTION LAW.

DIGBY (N.S.) ELECTION CASE.

CAMPBELL v. VAIL.

Recount—Duties and jurisdiction of County Judge.

[Digby, N.S., March 4.

The following judgment on a recount of votes in this case was delivered by

SAVARY, Co. J.:—The last three lines of section 56, "Dominion Election Act of 1874," enacting that the decision of the Deputy Returning Officer on an objection to a ballot, raised by an agent, shall be "final, subject only to reversal on petition questioning the election or return," suggest some doubt whether the judge, on a recount, can review any allowance or disallowance of the Deputy Returning Officer made after objection, or do more than correct any errors in the counting, strictly so called, of the ballots allowed for the respective candidates, and the allowances and disallowances the D. R. O. may have made of his own mere motion. Perhaps the better view is that those lines are repealed by implication by the provision for a recount. I have, therefore, not only corrected some errors simply of counting, but I have sustained one decision against a ballot, and counted two ballots, one for Mr. Vail at Meteghan, and one for Mr. Campbell at Salmon River, which were rejected by the D. R. O. The mark on the former, being across the candidate's name, is within his division of the ballot paper. The mark on the other, and a good mark in form, is higher up on the ballot paper than it should be, but there can be no doubt as to the candidate for whom it was intended. Single straight or oblique lines, without any line crossing them, or shewing an honest at-

tempt at an X, I disallow. (Bothwell Elec. Case, 7 S. C. Can. 677.)

Several ballots were not initialed by the D. R. O., but counting the unused ballots in such cases, I find no reason to suspect a fraudulent insertion into the boxes of any ballots not legally supplied, and therefore in those cases, I accept the decision of the officer at the close of the poll, that these ballots were supplied by him. In Sandy Cove, I find seven ballots for Vail, and four for Campbell, on which the Deputy Returning Officer has not put his initials, thus throwing upon the authenticity of the ballots a doubt which it is the decided policy of the law to guard against.

But the gravest mistake (or crime, if it was wilfully done for a purpose) is that in several districts, ballots, besides the initials, bear on their backs certain figures, which it is suggested to me, are the numbers of the voters on the electoral lists, or on the voters' list in the clerk's poll book. District No. 1, Hillsburgh, shows five ballots for Campbell, and eleven for Vail, with these figures on them. Weymouth, forty-five for Campbell, and eighteen for Vail, have such figures endorsed on them; and every ballot cast at No. 10 Church Point, and No. 15 Rossway has figures; with "No." before it thus endorsed. All these illegal marks are in the same handwriting, evidently that of the Deputy Returning Officer. If these figures really represent the numbers of the voters on the electoral or voters' list of the respective districts, then a serious wrong and injury has been perpetrated on every voter who has gone to the polls in full confidence that the secrecy of his ballot was to be sacredly preserved; but who has been delivered a ballot containing on its back a number that would, by comparing it with the list, show for whom he voted.

Mr. Campbell's majority being ninety-five, it would be reduced to fifty-two or fifty-three if I rejected the ballots containing these illegal marks; but I long ago concluded that the County Court judge ought not, on a recount, to reject ballots which have been supplied by the Deputy Returning Officer, in consequence of any mark calculated to identify the voter, unless such mark was placed there by the voter himself. To do so, would be to enable Deputy Returning Officers, through ignorance or evil design, to disfranchise whole districts at their will, and temporarily, at least, to seat in Parliament men who are not sustained by the voice of the people. The Deputy Returning Officer is required by sec. 55, Act of 1874, to "reject" all ballot papers "upon which there is any writing or mark by which the voter could be identified." Common sense requires that this rule should be read with this qualification, viz.: That a Deputy Returning Officer has no authority to disfranchise a voter; and, therefore, he is bound to count and allow a ballot, although he himself has put an illegal mark on it, to render it ineffective. The County Judge is to recount "according to the rules set forth in sec. 55"; that is, according to those rules qualified and limited, as I have explained, as respects ballots illegally marked by the Deputy Returning Officer. He is simply to count and allow what the Deputy Returning Officer *ought* to have counted and allowed, and reject and disallow what the Deputy Returning Officer *ought* to have rejected and disallowed. To go further would be to usurp the functions of the Superior Court, which alone has jurisdiction of election petitions, and can alone only apply the appropriate remedy, viz.: Vacate the election for irregularity, and order a new one, giving the wronged electors a chance to deposit their votes legally. On the contrary, by counting out the candidate for whom the people had properly marked the majority of the ballots, condemning those ballots for a defect in them caused by the Returning Officer's improper act, the County Judge himself would become the instrument of corrupt or ignorant officials to thwart, for the time being, the "well understood wishes of the people," leaving the onus of proceeding to set the election aside, on the man whom the people had signified their wish to elect. I am indeed, not to know whether these are identifying numbers or not, for I cannot take evidence, and will not examine the lists to see. My duty on a recount is, I hold, but little more than ministerial, in accordance with the view of it, which I have already set forth. I concur in every word of the judgment of his Honor Judge Cowan, then chairman of the Board of County Judges of Ontario, a judge of forty years' experience, as reported in 18 *Canada Law Journal* (N.S.), 304. In this case, fortunately, the majority is so large that the error would not affect the result; but if it did—if the majority in this case were wiped out, and a majority given to the opposite candidate, by the destruction of these ballots in that way, I should, nevertheless, count them, and leave it to the Supreme Court to prescribe the remedy on petition; and I submit, with all deference and respect, that those of my learned brethren who have felt themselves impelled to a contrary conclusion have exceeded their authority.

Other irregularities of lesser moment have been committed in this election. Some Deputy Returning Officers put in the ballot-box no statement showing the numbers polled for each candidate: many of them did not annex to their statements the affidavit which, by sec. 57, must be annexed to it; some only put a statement in the poll-book.

some did not separate the ballots into several packages and seal them up, as the law requires. Had the majority been so small that these irregularities could effect the result, a new election would have been the consequence. Some of these officials should be fined; for if incompetent, they should not accept the office; and if competent, should pay some respect to the duties so clearly defined in the Statute and Manual of Instructions furnished them, to fail in which involves such serious consequences to the public and individual candidates.

Acting on the above principles I find Mr. Campbell elected by a majority of 95.

Since preparing the above I find that sec. 56 is repeated in the Revised Statutes, its inconsistency with the provision for a recount having escaped the attention of the Revisers.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Proudfoot, J.] [March 10.

HAISLEY v. SOMERS.

Tax sale—Cash sale—Advertisement of sale—Disadvantageous sale—Notice to owner—Compensation for improvements—R. S. O. c. 180, secs. 109, 150, 155, 159—R. S. O. c. 95, s. 4.

At a sale of part of a certain lot for taxes, the treasurer, who made the sale, marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on Dec. 5th, 1884; the bid was for one-tenth of an acre only.

Held, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth.

Held, also, that neither did the fact that the purchase money was not paid for a week or two after the sale invalidate it.

It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented.

Held, that R. S. O. c. 180, ss. 150, 155 did not cure this defect.

Again, the part sold, the north one-tenth, was not the least disadvantageous to the owner, the southern boundary of it running through a house which was on the lot, leaving about four feet on the unsold portion.

Held, that on this ground the sale could not be sustained.

Again, though the owner of the land was known, he was not notified as required by R. S. O. c. 180, s. 109, of the assessment and liability to sell.

Held, that this also was an omission which was not cured by R. S. O. c. 180, s. 155.

Held, also, that the defendant was entitled under R. S. O. c. 95, s. 4, though not under R. S. O. c. 180, s. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses.

McCullough, for the plaintiff.

Hewson, for the defendant.

MCCLARY ET AL. v. JACKSON ET AL.

Lessor and lessee—Erection of buildings by lessee—Covenant by lessor to pay for Not running with land—Land or devisees of lessor not liable for value of buildings.

Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected.

Moss, Q.C., for motion.

Gibbons, contra.

CHANCERY DIVISION.

Boyd, C.] [March 5.

MASON v. MASON.

Devolution of Estates Act, 1886, *secs.* 4, 7—*Locke King's Act—R. S. O. c.* 106, *s.* 36.

The Devolution of Estates Act, 49 Vict. c. 22, is to be read in conjunction with R. S. O. c. 106, s. 36, and the words used in the 4th and 7th sections relating "to the payment of debts," applied to the payment of such debts as are charged on land, and by the terms of the R. S. O. c. 106, s. 36, are payable thereout as the primary fund.

A devise of one lot to a specific devisee, while the rest of the testator's land passes under a general devise to the executors in trust for the heirs-at-law, affords no indication of intention that the specific devisee is to enjoy free of the mortgage debt; nor is such an indication to be gathered from the fact that the testator directs his debts to be paid out of a mixed fund.

Miller, Q.C., for plaintiffs.

Donovan, for the widow.

Maclennan, Q.C., for D. Mason.

Moss, Q.C., and *W. Davidson*, for the other infants.

Boyd, C.] [April 6.

RE GABOURIE.

CASEY v. GABOURIE.

Will—Executor—Investment—Breach of trust.

G. lent money to W. on his promissory note, and when he died held such note as a security. By his will he directed his executors to get in the moneys outstanding, and invest the same in such stocks as they might deem advisable. C., the executor, who proved the will, left the loan outstanding on the note, and at a subsequent time renewed it, and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done was, as G. stated, because he could get 7½ per cent. interest for the estate, which was more than he could do if he invested it in stocks. W. Bros. afterwards became insolvent, and the amount of the note was lost to the estate. It was shown that the executor was advised not to invest in stocks. In taking the accounts in the Master's office it was held that the amount of the note should not be charged against him personally, but on appeal it was

Held, that it was a very obvious case of breach of trust which could not be excused, whatever may be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at 6 per cent., if it was proved that he could not have invested in stocks to realize that rate.

Sherry, and *Stevphen O'Brien*, for adult appellants.

F. W. Harcourt, for infant appellants.

T. Langton, for the executor.

Boyd, C.] [April 9.

RE MORICE AND RISBRIDGER.

Vendor and Purchaser—R.S.O. c. 109—*Provision in deed—Lawful issue.*

A deed made by C. G. (mother) to I. H. G. (daughter) just after her marriage, contained the following provision: It being hereby declared and agreed that it is intended by this deed to vest in the said I. H. G. life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said I. H. G., and to be held by them, their heirs and assigns in equal shares, and was executed by both grantor and grantee, but no issue were in existence at the date of the deed. In an application under the Vendor and Purchaser Act, R. S. O. c. 109, it was

Held, that the children of I. H. G. were interested in the grant, and that I. H. G. could not make a good title without all the children joining in the conveyance.

Maclennan, Q.C., for the vendor.

D. M. McIntyre, for the purchaser.

PRACTICE.

Mr. Dalton, Q.C.] [March 26.

CANADIAN BANK OF COMMERCE v. MIDDLETON.

Costs, security for—Issue arising out of garnishment proceedings—Interpleader issue.

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs; but

Semble, owing to there being no rule in Ontario similar to the English Rule 863 of 1883, there is no power to make such an order in an interpleader issue.

Belmonte v. *Aynard*, 4 C. P. D. 352, and *Tomlinson* v. *Land and Finance Corporation*, 14 Q. B. D. 539, discussed.

Walter Macdonald, for the plaintiffs.

McMichael, Q.C., for the claimant.

CORRESPONDENCE.

LIMITATION OF ACTIONS.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—Having become familiar with the decisions in the several cases referred to in your able article of the 15th January last, as they were reported, and noticing the conflicting opinions of the Court of Appeal here and in England, I have become interested in the question of "The Limitation of Certain Actions."

Without saying anything as to whether Mr. Justice Gwynne, Chief Justice Wilson and the late Mr. Justice Morrison's judgments, affirmed, as they were, by the Court of Appeal in England, by *Sutton* v. *Sutton*, and *Fearnside* v. *Flint*, or the judgments of our Court of Appeal in *Allen* v. *McTavish* and *Boice* v. *O'Loane*, are right or wrong, I beg with deference, as we are human, and liable to error, to call attention to that part of Mr. McClive's article of March 1st, where he says: "In England a judgment becomes a lien upon the lands of a debtor by a procedure called docketing, which binds the lands of a judgment debtor throughout England, no matter where situate." I have reason to recollect that in England, by 2nd and 3rd Vict. c. 11, which, after reciting that "it is desirable that further protection should be afforded the purchasers against judgments, Crown debts and *lis pendens*," enacted "that no judgment shall hereafter (4th June, 1839—nearly fifty years ago) be docketed under 4th and 5th W. & M. c. 20; but that all such dockets shall be finally closed immediately after passing of this Act (4th June, 1839), without prejudice to the operation of any judgment already docketed and entered under the said recited Act. No doubt under 4th and 5th W. & M. the docketing of a judgment did bind the lands of a debtor throughout England until the effect of docketing was (in the language of the late Sir John Robinson, in *Doe dem. Dougall* v. *Fanning*, 8 Q. B. 166, *Doe Dempsey* v. *Boulton*, 9 Q. B. 532) "done away with by the Imperial Act., and registration of judgment substituted." It will be well remembered by Chief Justice Wilson, Mr. Justice Gwynne, and other judges, that in this Province no judgment could be entered without a "docket paper," from which, as soon as the judgment was signed, it was docketed in a book kept solely for the purpose, as early as, and even before *Doe d. Auldjo* v. *Hollister*, 5 O. S. 739, by which our courts held that "lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them." Yet strange as it may appear, although in England the effect of docketing was by 2nd Vict. discontinued and registration substituted, docketing in England continued until, by Imperial Act, 12th Vict. c. 110, it was, as well in form as effect, abolished, and docketing continued in force here (without the effect it had in England up to 1839) until our Act, 9th Vict. c. 34, s. 36, as amended by several subsequent Acts, provided for judgments binding lands by registration.

What has probably misled Mr. McClive is the recital in our repealed Act, 9th Vic.: that the registration of a judgment "Shall affect and bind all lands belonging to the defendant from the time of registration, in like manner as the docketing of judgment in England affects and binds lands." At the time of passing of which Act here, the docketing of judgments *so* as to affect lands in England had ceased. Chief Justice Sir John Robinson, in another case—*Doe dem. Dempsey* v. *Boulton*, 9 Q. B. 532, showed clearly that the words quoted should be read to mean, as the judgment docketed in England (when docketing was required) *used* to

bind lands from the time of docketing and not from the entry of judgment. From this it is probable that the English courts, in considering *Sutton* v. *Sutton*, and *Fearnside* v. *Flint*, had no occasion to, and did not, allude to the effect docketing judgments once had on land in England.

From all this it would appear that the effect of docketing judgments in England, abolished nearly fifty years ago, will not assist either the Courts of Appeal in England or here to harmonize hereafter on the subject of "Limitation of Certain Actions." My own views on this important question were advanced for me by the counsel in *McMahon* v. *Spencer*, 13 A. R. 430, in which case, however the court, were not I apprehend, embarrassed by the conflicting opinions of the courts hitherto as to the ten or twenty years' limitation, for the judgment was over twenty years old, and nothing regularly done upon it for that time. But as the late Chief Justice Moss seemed to have misgivings, and would have agreed with Gwynne, Morrison and Wilson, JJ., had it not been for *Hunter* v. *Nockolds*, a pretty good guess can be given, (although Ardagh, Co. J., in *Somers* v. *Kenny*, says we have no means of knowing what the Court of Appeal may do when the ten or twenty years shall come up squarely again before them,) if meantime the two English cases should stand unreversed by the Privy Council.

Yours, etc.,

A. R. DOUGALL.

Belleville, 8th March, 1887.

FUSION OF LAW AND EQUITY.

To the Editor of the LAW JOURNAL.

DEAR SIR,—The Bar associations of this and other counties have passed strong resolutions bearing upon the importance of fusion of law and equity not only in name, but in reality; but another example of the "waste of judicial force" has occurred here to-day, showing the necessity of immediate action and the practical carrying out of the outspoken opinions of the profession here and elsewhere throughout the Province.

The learned Justice, to whom was assigned the duties of taking the "old-fashioned hearing" of the Chancery Division, arrived here this morning in due course, made his bow to about six people in the court room, heard one of the two cases "set down," was informed that the other case had been settled, and thereupon, after about three hours session, closed the court, which, by the way, will be opened again in a fortnight by another learned Justice, from the Common Law Division, who will conduct what is known as "an assize," though the case heard to-day might quite as readily have been disposed of at such assizes.

Surely, Sir, it is time this farce, repeated here every spring and autumn, be put a stop to, and the strength of the Bench concentrated and made more practically useful by doing away with two sessions of the court (I use the expression advisedly, as there is practically now one court at Osgoode Hall, though it may have the character of a trinity), and arrangements made to dispose of the civil and criminal business of the Province, not by piece-meal as is now the case, but by two or three sittings equally distributed throughout the year, and presided over by Judges of the court irrespective of the peculiar nature of the business they may have been heretofore in the habit of "practising."

This, and this only, is the way the business can be properly, expeditiously and economically despatched, and is the way, no doubt, contemplated by the Judicature Act, or perhaps better styled the "Fusing Act."

The hitherto tranquil state of our local bar has been somwhat disturbed by an agitation for the appointment of a junior Judge, which we have always managed to do without, and the only necessity for which it is urged is the occasional absence of the County Court Judge upon protracted outside arbitrations; but these gentlemen, forgetting again their resolutions that the practice should be more thoroughly fused, and ignoring the fact that there are two Masters in Chancery, have not thought fit to urge the extension of their powers to enable them to take the work of County Court Chambers (when the County Court Judge may be absent) rather than the appointment of some member of the profession, who, from the very nature of the emoluments attached to the office, must necessarily be one not enjoying a large or remunerative practice, and could therefore hardly be looked upon (if he be appointed) as lending any great strength by his experience to the Bench of this county.

Yours, etc. B.

Hamilton, March 28, 1887.

OSGOODE HALL LIBRARY.

(Compiled for THE CANADA LAW JOURNAL.)

The following is a list of books received at the library during the months of January, February and March, 1887 :

Abbott's Ct. Appeal Decisions, 4 vols., New York, 1873-83.
American Reports (Various States), 25 vols.
American Probate Reports, 4 vols,, New York, 1881-86.
Beccaria on Crimes, Albany, 1872.
Best on Evidence, 7th ed., London, 1883.
Bigelow on Estoppel, 4th ed., Boston, 1886.
Bigelow on Torts, 3rd ed., Boston, 1886.
Bishop on Criminal Law, 7th ed., 2 vols., Boston, 1882.
Books for a Reference Library, London, 1885.
Besswell on Insanity, Boston, 1885.
Byles on Bills, 14th ed., London, 1885.
Canada, Rev. Stat. of, 2 vols. (8 copies), Ottawa, 1887.
Canada Patent Office Record, vols. 8 to 13, Ottawa, 1880-6.
Challis on Real Property, Philadelphia, 1887.
Chaster on Powers of Executive Officers, London, 1886.
Chicago Law Institute Library Catalogue, 1887.
Copinger on Rents, London, 1886.
Deane on Conveyancing, 2nd ed., London, 1883.
De Colyar on Guarantees, Philadelphia, 1887.
Dicey—"England's Case against Home Rule," London, 1886.
Emden's Digest for 1886, London, 1887.
Fletcher on Quantities, 4th ed., London, 1884.
Fletcher on Light and Air, 2nd ed., London, 1886.
Fletcher on Compensation, London, 1874.
Fletcher on Arbitration, London, 1875,
Geare on Investment of Trust Funds, London, 1886.
Geological Survey of Canada, Montreal, 1886.
Gormully and Sinclair on Banks and Banking, Ottawa, 1887.
Greenhood on Public Policy in Contracts, Chicago, 1886.
Hare on Contracts, Boston, 1887.
Harris on Criminal Law, 4th ed., London, 1886.
Hearn on Government of England, London, 1887.
Hearn, Aryan Household, London, 1879.
Jones (D.A.), Construction, Commercial and Trade Contracts, New York, 1886.
Jones (L.A.), Law of Mortgages, 3rd ed., Boston, 1882.
Kinney's Digest Sup. Ct. U.S., 2 vols., Boston, 1886.
Kneeland on Attachment, New York, 1885.
Krueger's Code of Civil Law, Berolina, 1877.
Law Times (N.S.), Index to vols. 41-50, London, 1886.
Law Quarterly Review, vols. 1 and 2, London, 1885-6.
Leith's Williams' Real Property, Toronto, 1881.
Maryland Reports, 21 vols. 1800-43.
Martin on Maintenance, London, 1886.
Marvin on Wrecks and Salvage, Boston, 1858.
Mommsen's Justinian, 2 vols., Berolina, 1877.
Morrison on Ct. Martial Procedure, Chatham, E., 1886.
Muirhead's Gaius and Ulpian, Edinburgh, 1880.
Mulhall's History of Prices, London, 1885.
Mulhall's Dictionary of Statistics, London, 1886.
McCaul, Satires and Epistles of Horace, Dublin, 1833.
New York C.P. Reports, Index to, Rochester, 1886.
Ontario Draft Rev. Statistics, 2 vols., Toronto, 1887.
O'Sullivan on Government of Canada, Toronto, 1879.
Pollock on Contract, 4th ed., London, 1885.
Pomeroy on Constitutional Law, 8th ed., Boston, 1875.
Pritchard's Admiralty Digest, 3rd ed., London, 1887.
Ransome, "Our Colonies and India," London, 1885.
Redman & Lyon on Landlord and Tenant, 3rd ed., London, 1886.
Reid's Patent Ready Reckoner, London, 1886.
Robert's Vermont Digest, Burlington, 1878.
Roby's Justinian de Usufructu, Cambridge, 1886.
Roby's Justinian, Cambridge, 1886.
Salkowski on Roman Law, London, 1886.
Savigny on Private Int'l Law, 2nd ed., Edinburgh, 1880.
Schouler on Wills, Boston, 1887.
Scotland, Digest Sup. Ct., 3 vols., Edinburgh, 1867.
Scrulton on Charter Parties, London, 1886.
Short's Crown Office Rules, London, 1886.
Smith (C.M.), Master and Servant, Philadelphia, 1886.
Smith (H.), Law of Negligence, Philadelphia, 1887.
Smith (H.), Law of Negligence (Whittaker's ed.), St. Louis, 1886.
Smith (J.W.), Law of Bills, Cheques etc., London, 1887.
Smith (J.W.), Manual of Common Law, 9th ed., London, 1880.
Smith (J.W.), Manual of Equity, 13th ed., London, 1880.

Show & Winstanley's Annual Practice, London 1886.
Spaulding on Public Lands, San Francisco, 1884.
Stephen's Digest Evidence (Chase's edition), New York, 1886.
Stewart on Husband and Wife, San Francisco, 1885.
Story on Military Law, London, 1886.
Stutfield on Betting, 2nd ed., London, 1886.
Taylor (H.O.), Private Corporations, Philadelphia, 1884.
Taylor (T.W.), Equity Jurisprudence, Toronto, 1875.
Tennesee Reports, 80 vols., 1791-1886.
Thornton's Cyclopædia of Law, Northport, N.Y., 1885.
Throop's Civil Procedure, N.Y., Albany, 1886.
Trendell, Her Majesty's Colonies, London, 1886.
Turner, Organization of a Solicitor's Office, London, 1886.
Welch's Digest Ohio Decisions, Cincinnati, 1877.
Washburn on Real Property, 5th ed., Boston, 1887.
Wharton on Criminal Law, 9th ed., Philadelphia, 1885.
Wood (H.G.), Master and Servant, 2nd ed., Albany, 1886.
Wood (H.G.), Law of Nuisances, 2nd ed., Albany, 1883.
Wood (J.D.), Mercantile Agreements, London, 1886.

D.

FLOTSAM AND JETSAM.

NOT OF THAT KIND.—"Was your husband on the stand yesterday?" asked the lawyer of a woman in a case in which husband and wife were witnesses. "No," she answered with a snap, "he wasn't on the stand. He was on the set. That's the kind of a man he is, whenever there is anything to set on, from a sat-in sofy to the top rail of a worm fence."—*Ex.*

DEADLY WEAPON.—A knotty legal question has arisen in the State of North Carolina, which may have to be decided by the Superior Court of that State. All of this because a coloured man called a brother descendant of Ham a liar, and the offended party belaboured the head of the offending negro with the only available weapon, which chanced to be a ten pound mud turtle. The question to be decided is whether or not a mud turtle is a lethal weapon. The court is fully competent to struggle with this problem, one of its learned judges having already decided that a bull dog is a "deadly weapon."—*Washington Law Reporter.*

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887. 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. MAY 15, 1887. No. 10.

DIARY FOR MAY.

15. Sun.....*5th Sunday after Easter.*
16. Mon.....Easter sittings begin.
19. Thur.....Ascension Day.
21. Sat.....Confederation proclaimed 1867. Lord Lyndhurst born 1772.
22. Sun.....*1st Sunday after Ascension.*
24. Tues.....Queen Victoria born 1819.
27. Fri.....Habeas Corpus Act passed 1679. Sir W. Grant, Master of the Rolls, 1801.
29. Sun.....*Whit Sunday.*
31. Tues.....Parliament of U. C. first met at Toronto, 1797.

TORONTO, MAY 15, 1887.

NUMBER five in the text-book series of the Blackstone Publishing Company is Lord Blackburn's treatise on Contracts of Sale from the second English edition. We presume most of our readers are subscribers to this series by this time. If not they had better begin at once.

WE regret to chronicle the death of Frederick William Jarvis, Esq., until recently Sheriff of the County of York. He succeeded his uncle, the late W. B. Jarvis, in the year 1856, and has occupied the position with credit to himself and much satisfaction to the profession ever since. He was a most kind, estimable, and liberal gentleman in private life, and he performed his duties as Sheriff with unswerving fidelity, and in a manner which will cause his loss to be much felt by all those who had occasion to do business with him. The office is now, we regret to say, divided. We see no use for this except to multiply patronage. It will be inconvenient to the public and the profession, and serves no good purpose.

THE CRIMINAL JURISDICTION OF THE CHANCERY DIVISION.

ALTHOUGH it is now close upon six years since the Judicature Act came into force, it is only quite recently that any criminal case has been brought before the Chancery Division.

At the last sittings of the Divisional Court of the Chancery Division, a case of the *Queen* v. *Fee* was before that Court. An application had been made to Ferguson, J., to quash a conviction of the defendant for an alleged breach of the Canada Temperance Act. Counsel for the magistrate having failed to appear on the return of the order *nisi*, Ferguson, J., disposed of the application in his absence, and following the decision of Galt, J., in *Reg.* v. *Halpin*, 12 Ont. R. 33, quashed the conviction on the ground that the accused had been called as a witness, and had been compelled to prove his own guilt. Subsequently counsel for the magistrate applied to Ferguson, J., to open the order and hear argument, and the application was adjourned by him before the Divisional Court. The Divisional Court entertained the motion and affirmed the conviction, holding that *Reg.* v. *Halpin* had been wrongly decided, and was opposed to the express provisions of the statute which made the accused a competent and compellable witness. This, by the way, was the opinion we expressed on the point shortly after Mr. Justice Galt gave his decision (see *ante*, vol. 22, p. 394).

It has, we think, heretofore been tacitly assumed by a good many members of the profession that notwithstanding the changes in the constitution of the courts, effected by the Judicature Act, the crimi-

nal jurisdiction of the Courts of Queen's Bench and Common Pleas, as those courts existed before the Judicature Act, still remained vested exclusively in the Queen's Bench and Common Pleas Divisions of the High Court of Justice. But the case of the *Queen* v. *Fee* seems to show that this opinion may not be well founded, and that it is possible that the Chancery Division has now co-ordinate jurisdiction with the other Divisions, in criminal, as well as civil proceedings. This point, it is true, was not distinctly adjudicated upon in the *Queen* v. *Fee*, for in that case it appears to have been assumed by both counsel and the Court that the Chancery Division was entitled to exercise jurisdiction in criminal matters. It appears to us, however, to be a question not altogether free from doubt.

The impression to the contrary has probably to some extent arisen from a perhaps too cursory consideration of certain passages in the Judicature Act and Rules. Section 87 of the Judicature Act enacts that "nothing in this Act or in the Schedule thereto affects, or is intended to affect, the practice or procedure in criminal matters, or matters connected with Dominion controverted elections, or proceedings on the Crown or revenne side of the Queen's Bench or Common Pleas Divisions." Rule 484 further provides that "nothing in these Rules shall be construed as intended to affect the practice or procedure in criminal proceedings, or proceedings on the Crown or revenue side of the Queen's Bench or Common Pleas Divisions." The expression "Queen's Bench and Common Pleas Divisions," in both these enactments appears to be a slight anachronism for *qua* "Divisions" that had no previous existence. Its use seems rather to suggest the idea that these two Divisions are still to exercise exclusive jurisdiction in the matters specified. If it is intended to apply to the future practice of the High Court, instead of Queen's Bench and Common Pleas Divisions, the proper expression to have used was "the High Court of Justice."

It will be observed, however, that both the section of the statute and the rule cited above are in terms confined to "practice or procedure." The constitution or jurisdiction of the court does not appear to come under either of those heads; and it seems therefore clear that the section and rule above cited do not really affect the question we are considering. (See per Strong, J., *Mitchell* v. *Cameron*, 8 S. C. R. 135.)

By the British North America Act, s. 92, ss. 14, "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts" is vested in the Provincial Legislature. It is clear from this that the Provincial Legislature has power to constitute, maintain and organize Provincial Courts of criminal jurisdiction; but the power to constitute a court of criminal jurisdiction does not appear necessarily to include the right explicitly to define the particular criminal jurisdiction to be exercised by it. This proposition may seem to savour of paradox, but a little consideration will show that it is perfectly tenable. There is no necessary inconsistency in saying, that though true it is that the Provincial Legislature has the power to constitute, organize and maintain a court of criminal jurisdiction, yet that the power to determine the precise nature and limits of the criminal jurisdiction which the court so constituted is to exercise, rests with the Dominion Government, and this we think, it may not unreasonably be argued, is the real effect of the B. N. A. Act.

Were it otherwise, it would be possible for the Provincial Legislature to make

every Division Court a court of criminal jurisdiction, and to confer on such courts unlimited powers in criminal cases, *e.g.*, to try capital felonies. We think this would be clearly opposed to the spirit and intention of the B. N. A. Act; and, if so, it goes to show that the right to constitute a court of criminal jurisdiction does not necessarily include the right to define the particular jurisdiction in criminal proceedings which the court may exercise.

Prior to Confederation the Courts of Queen's Bench and Common Pleas had an exclusive criminal jurisdiction, and the Court of Chancery had an exclusive civil jurisdiction. By the B. N. A. Act, s. 129, these courts were continued, subject to being altered by the Provincial Legislature.

Turning to the Judicature Act we find that section 3 provides that the Courts of Appeal, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas shall be united and consolidated together and constituted one Supreme Court of Judicature. Sub-section 2 goes on to provide, that the Supreme Court shall be divided into two permanent divisions; and that the Courts of Queen's Bench, Chancery, and Common Pleas are to constitute one of such divisions, to be called the High Court of Justice for Ontario; and the Court of Appeal is to constitute the other division. Section 9 defines the jurisdiction of the High Court, and it provides that it shall have the jurisdiction which, at the commencement of the Act, was vested in, or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas and Courts of Assize, Oyer and Terminer, and gaol delivery (whether created by commission or otherwise), and shall be deemed to be, and shall be, a continuation of the said courts respectively (subject to the provisions of the Act), under the name of the High Court of Justice. This jurisdiction by the following sub-section is also defined to include (subject to the exceptions hereinafter contained) the jurisdiction which at the commencement of the Act was vested in, or capable of being exercised by, all or any one or more of the judges of the said courts respectively, sitting in court, or chambers, or elsewhere, when acting as judges, or a judge, in pursuance of any statute or law; and all powers given to any such court, or to any such judges or judge by any statute; and also all ministerial powers, duties, and authorities incident to any and every part of the jurisdiction.

The effect of this Act was therefore to make the Court of Chancery, which was formerly a court of civil jurisdiction only, a part of a court having criminal jurisdiction. It was, no doubt, within the power of the Provincial Legislature to have made the Court of Chancery a court of criminal jurisdiction. It could, no doubt, have legislated in this respect for the Court of Chancery alone, and could have enacted that henceforth it should be a court not only of civil but also of criminal jurisdiction. Such legislation, however, in order to give the Court of Chancery the same powers in criminal matters as the Queen's Bench and Common Pleas had, would have to have been supplemented, it appears to us, by an Act of the Dominion Parliament defining the nature of the criminal jurisdiction which the Court of Chancery might exercise. If this is correct, then it seems to follow that the same kind of legislation is equally necessary in order to confer criminal jurisdiction on the Chancery Division of the High Court of Justice. In other words, if the Ontario Legislature could not, as we think it could not, by its own unaided efforts give the Court of Chancery co-ordinate criminal jurisdiction with the former Courts of Queen's Bench and Common Pleas, it seems to

follow that it could not do so by the mere process of amalgamating that court with the other two courts.

The High Court, so far as the addition of the Chancery Division is concerned, is not only in name, but also as far as criminal jurisdiction is concerned, in substance to all intents and purposes a new court of criminal jurisdiction; and though the process of amalgamation might very reasonably be held not to deprive the Queen's Bench and Common Pleas Divisions of any criminal jurisdiction which they possessed before the amalgamation, it would not by any means follow that the amalgamation had the effect of extending the jurisdiction those two courts possessed to the Court of Chancery. It is true the Judicature Act assumes to give to the Court of Chancery, as one of the component parts of the High Court, the like jurisdiction in all respects as that previously exercised by the other two divisions of the High Court, but whether that was not *ultra vires* of the Ontario Legislature, so far as criminal jurisdiction is concerned, seems open to the doubt we have expressed.

No Act has been passed by the Dominion Parliament since the Judicature Act conferring on the Chancery Division the same co-ordinate criminal jurisdiction as that exercised by the other two divisions. The Revised Statutes of Canada, however, appear to recognize the High Court of Justice generally as having criminal jurisdiction. In chap. 174, s. 2, the High Court of Justice for Ontario is defined to be the court for Crown cases reserved. Sec. 3 enacts that every Superior Court of criminal jurisdiction shall have power to try any treason, felony, or other indictable offence, and if this were the consolidation of any Act passed subsequent to the Judicature Act, it would undoubtedly confer on the Chancery Division jurisdiction to try such offences. This latter provision, however, is a consolidation of prior enactments, and it is open to argument whether it has the effect of conferring on a court constituted subsequent to the passing of the enactments here consolidated a criminal jurisdiction which it did not previously have. In other words, "every Superior Court of criminal jurisdiction" might be argued to mean every such court existing when the Acts consolidated were passed, and not necessarily every such court thereafter constituted, or existing at the time of the consolidation of the statutes. See 49 Vict. c. 4, s. 8 (R. S. ch. xii.), which provides that the Revised Statutes are not to be held to operate as new laws.

R. S. C. ch. 174, s. 269, provides that any judge of the High Court may reserve his decision at a trial; section 270 provides that the practice and procedure in all criminal cases in the High Court shall be the same as before the establishment of the High Court; and section 271 provides that if any commissions are issued for holding assizes they shall contain the names of the justices of the Supreme Court; these provisions are the consolidation of 46 Vict. c. 10, an Act passed subsequent to the Judicature Act, and so far as they go no doubt have the effect of conferring on the individual judges of the Supreme Court the particular criminal jurisdiction therein expressed. But the doubt we have is whether as a court or part of the High Court, the Chancery Division has, by any statutory enactment of the Dominion, yet had vested in it a general co-ordinate jurisdiction in criminal matters with that of the other two divisions.

Considering the importance of the question, this is a point which deserves careful attention, and if there be any technical defect in the legislation on the subject it should be remedied ere it has occasioned a failure of justice.

RECENT ENGLISH DECISIONS.

The *Law Reports* for April comprise 18 Q. B. D. pp. 449-572: 12 P. D. pp. 105-118, and 34 Chy. D., pp. 423-581.

PRACTICE—INTERPLEADER—JUS TERTII.

The case of *Richards* v. *Jenkins*, 18 Q. B. D. 451, is one of some importance on the practice in interpleader proceedings by the Sheriff. This case has been already noted when before the Divisional Court (vol. 22, p. 376). The decision now reported is that of the Court of Appeal (affirming the Queen's Bench Division). The facts were simple. The claimant had let the goods in question for hire, and subsequently became bankrupt. He did not inform the trustee in bankruptcy that he owned the goods, and the hirer, in ignorance of the bankruptcy, continued to pay the claimant for their hire. While in possession of the hirer the goods were taken in execution under a judgment against him. And the question was whether the execution creditor could set up the right of the trustee in bankruptcy in order to defeat the claimant. This, the Court of Appeal decided in the affirmative, holding that, even assuming the execution debtor was estopped from denying the title of the claimant to the goods, such estoppel did not bind the execution creditor.

Though affirming the decision, the Court of Appeal did not altogether adopt the reasoning of the court below. In the latter court the right of the execution creditor to set up a *jus tertii* was put on the ground that as against the claimant he was to be deemed to be in possession, but Lord Esher, M.R., repudiates that reasoning as untenable; and the judgment of the Court of Appeal proceeds on the ground that the goods being in possession of the execution debtor at the time of seizure, they were *prima facie* his property, and the question in the issue being whether the goods were the goods of the claimant as against the execution creditor, the claimant could not succeed unless he showed a good title.

CRIMINAL PRISONER—STATUTORY OFFENCE HOW FAR A CRIME.

Osborne v. *Milman*, 18 Q. B. D. 471, is a decision of the Court of Appeal reversing the judgment of Denman, J., which we noted vol. 22, p. 376. The question was whether a person who had been committed to gaol on a summary application for practising as a solicitor without being duly qualified, contrary to a Statute, was to be deemed a criminal prisoner. Denman, J., held that as his imprisonment had been ordered on a summary application without indictment he was not a criminal prisoner; but this conclusion the Court of Appeal was unable to accede to. In the view of the Court of Appeal, the procedure by which the punishment was awarded was immaterial. The question was governed by the consideration whether the offence was or was not a crime, and the offence in question being one which would clearly have been indictable as a misdemeanour, and punishable by imprisonment, it was held to be a crime.

CRIMINAL LAW—EVIDENCE—ATTEMPT TO COMMIT RAPE—EVIDENCE OF PREVIOUS CONNECTION BETWEEN PROSECUTRIX AND PRISONER.

The case of *The Queen* v. *Riley*, 17 Q. B. D. 481, sets at rest a question of evidence, which Mr. Justice Stephen left in doubt in his work on Evidence. (See "Stephen's Evidence," art. 134.) The prisoner was indicted for an assault with intent to commit rape. The prosecutrix denied on cross examination having voluntarily had connection with the prisoner prior to the alleged assault, and a case was reserved on the point whether evidence on the part of the prisoner could be received to contradict her by proving such prior connection. Mr. Justice Stephen laid it down that in such a case "She *probably* may be contradicted." This case determines definitely that such evidence is admissible.

FOREIGN NEGOTIABLE INSTRUMENT—CONFLICT OF LAWS—BONA FIDE HOLDER—RIGHT OF.

Picker v. *The London and County Banking Co.*, 18 Q. B. D. 515, was an action of detinue to recover possession of certain Prussian bonds, which, by the law of Germany, were negotiable instruments. The bonds were stolen from the plaintiff, and subsequently came into the possession of the defendants *bona fide*. It was held by the Court of Appeal (affirming A. L. Smith, J.,) that in the absence of evidence to show that such bonds were by the custom of merchants treated as negotiable instruments in England, a *bona fide* transferee thereof could not acquire a good title thereto

as against a rightful owner from whom they had been stolen.

Cruelty to animals—Operation for purpose of improving animal—12 & 13 Vict. c. 92, s. 2 (R.S.C. c. 172, s. 2).

In *Lewis* v. *Fermor*, 18 Q. B. D. 532, the defendant was prosecuted for alleged cruelty to animals. The alleged offence consisted in his having performed the operation of "spaying" on five sows. This operation consists in cutting out the uterus and ovaries, and removing them through an incision made in the flank of the sow for the purpose. It is performed on sows because it is believed to increase their weight and development. It is attended with considerable pain to the animal. The justices before whom the charge was brought having stated a case for the opinion of the court, it was held by Day and Wills, JJ., that the defendant had not been guilty of any offence within the Statute. (See R.S.C. c. 172, s. 2.)

Criminal law—Trial—Misreception of evidence

The Queen v. *Gibson*, 18 Q. B. D. 537, is a decision upon a Crown case reserved by a chairman of quarter sessions. The court (Lord Coleridge, C.J., Pollock, B., and Stephen, Mathew, and Wills, JJ.,) holding that when evidence not legally admissible against a prisoner is left to the jury, and they find him guilty, the conviction is bad, and this, notwithstanding that there was other evidence before them properly admitted, sufficient to warrant a conviction. The inadmissible evidence in this case consisted in a statement alleged to have been made to the prosecutor by a passer-by who was not called as a witness, and it was not shown that the statement had been made in the presence of the prisoner. The prisoner's counsel had not objected at the time the evidence was given to its reception, but, on the chairman charging the jury, he insisted that this statement should be withdrawn from their consideration, which the chairman refused to do, on the ground that the objection came too late. It was held, however, by the Judge that the conduct of counsel for the prisoner did not affect the question; that it is the duty of the Judge to take care that a prisoner is not convicted upon any but legal evidence.

Election petition—Trial—Change of venue.

In *Arch* v. *Bentinck*, 18 Q. B. D. 548, an application was made to change the venue for the trial of an election petition. It was admitted that the only witness required to be called would be the respondent, and that the question in controversy was a question of law, and it was held that "special circumstances" existed within the meaning of the 31 & 32 Vict. c. 125, which warranted ordering the petition to be tried in London.

Statute of Limitations—Right of remainderman—Rule in Shelley's case.

In *Pedder* v. *Hunt*, 18 Q. B. D. 565, the Court of Appeal reversed a judgment of Manisty, J., giving a very obviously erroneous interpretation of the Statute of Limitations. A testator devised certain land to his sons successively for life, beginning with the youngest, and after their death "to be forever enjoyed by the oldest surviving heir of his oldest surviving son for their life or lives forever." The eldest surviving son being in possession, executed more than six years before his death a conveyance in fee to the defendant. He left one son who, more than six, but within twelve years, after his father's death brought this action to recover possession, claiming as devisee under the will of the testator. The heir-at-law of the testator was also joined as a co-plaintiff. Manisty, J., held that the eldest surviving son of the testator was the person last entitled to the particular estate upon which the plaintiffs' estate in remainder was expectant, within the Real Property Limitation Act, 1874, s. 2 (R.S.O. c. 108, s. 6); and that as he was not in possession at the time of his death in 1877, and more than six years had elapsed since his right had first accrued, the plaintiff had only six years from 1877 to bring the action, and consequently the plaintiffs' claim was barred. The Court of Appeal, however, point out that the conveyance by the eldest surviving son to the defendant, though purporting to be in fee, was a valid conveyance of the sons' life estate, and that the defendant himself therefore became the person entitled to the particular estate, and being in possession section 2 did not apply, and therefore the plaintiffs' action was in time. The claim of the plaintiffs was sought to be defeated on the ground that, under the rule in

Shelley's case, the eldest surviving son took an estate tail, which was barred by the conveyance to the defendant. But as to this point the Court of Appeal said the argument could not prevail, because where the limitation shows the testator's intent to have been that the heir shall take for life only, then the word "heir" is not to be treated as a word of limitation, and the rule does not apply. The intention of the will in question the Court of Appeal held to be to create a series of life estates for ever, each of such estates vesting in the heir for the time being of the last surviving son of the testator. But whether this disposition was valid in law the court omits to state, and the judgment, though in favour of the plaintiffs, is silent as to the rights of the plaintiffs *inter se*. It would appear from the case of *Seaward* v. *Willock*, 5 East. 198, that the disposition in remainder was invalid, and consequently that the heir-at-law of the testator would take. (See *Peterborough Investment Co.* v. *Patterson*, per Wilson, C.J., at p. 151.)

WILL—CODICIL EXECUTED ON MARGIN OF WILL—WILLS ACT (1 VICT. C. 26 S. 9), (R.S.O. C. 106 S. 12).

The only case in the Probate Division we think it necessary to notice is *Re Hughes*, 12 P. D. 107. In this case a testator executed a will prepared by a solicitor which was written on the first side of a sheet of paper. Desiring shortly before his death to make an alteration in the disposition of his property, he called in the aid of a neighbour, who wrote a codicil on the third page of the sheet of foolscap, beginning "The following alterations having been first made," and ending with an attestation clause in due form. The mark of the testator, however, and the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration of the will it ought to be attested on the margin. (See. R.S.O. c. 106, s. 23.) It was held by Sir Jas. Hannen that the codicil was not duly executed, and probate was refused.

WILL—CONSTRUCTION—GIFT TO TITLED PERSON—LAPSE.

Proceeding now to the cases in the Chancery Division, *In re Whorwood*, *Ogle* v. *Sherborne*, 34 Chy. D. 446, deserves a brief notice. A testator, by his will, bequeathed his "Cromwell Cup," a silver cup which had originally belonged to the Protector, to Lord Sherborne and his heirs as an heirloom. The Lord Sherborne, who was living at the date of the will, predeceased the testator. Evidence was given showing that the testator had heard of his death, and also that he had had no personal acquaintance with him. His successor in the title claimed to be entitled to the bequest, but it was held by the Court of Appeal (affirming North, J.), that the bequest lapsed.

SOLICITOR AND CLIENT—STATUTE OF LIMITATIONS.

The case of *In re Bell*, *Lake* v. *Bell*, 34 Chy. D. 462, is one in which the principle unsuccessfully invoked in *Coyne* v. *Broddy*, 13 Ont. R. 173, was held to apply. In 1868, one Bell, acting for Willoughby, a mortgagee, effected a sale of the mortgaged premises, and retained in his hands the surplus after payment of the mortgage debt. The mortgagor died intestate and without heirs, or next of kin, and no administration was ever granted to his estate. Willoughby, the mortgagee, died in 1877, leaving his property to his widow whom he appointed his executrix. She died in 1878, having appointed Bell and one Ranshaw her executors. Upon the death of Bell in 1881, Ranshaw as being through Mrs. Willoughby the legal personal representative of Willoughby the mortgagee, claimed as against Bell's estate the surplus proceeds of the sale in 1868 of the mortgaged property. And it was held by Chitty, J., that Bell, having received this balance in a fiduciary character as agent for the mortgagee, and with full knowledge that the mortgagee was an express trustee of the surplus for the mortgagor, and in the circumstances, liable to a claim by the Crown, had brought himself within the principle laid down in *Burdick* v. *Garrick*, L. R. 5 Chy. 233, and that, therefore, the Statute of Limitations could not be set up in bar of the claim.

MARRIED WOMAN, INCAPACITY OF, TO ACT AS NEXT FRIEND—MARRIED WOMAN'S PROPERTY ACT, 1882, S 1.

In re Somerset, *Thynne* v. *St. Maur*, 34 Chy. D. 465, Chitty, J. decided that notwithstanding the *Married Woman's Property Act*, 1882, s. 1, (47 Vict. c. 19, s. 2, ss. 2), which enables a married woman to sue and be sued as if she were a *feme sole*, she is not rendered capable of acting as a next friend or guardian *ad litem* to infants.

Recent English Decisions.

PRACTICE—RECTIFICATION OF ORDER MADE UNDER MISTAKE — TRUSTEE — SUMMARY ORDER FOR PAYMENT AGAINST TRUSTEES' SOLICITOR.

In *Staniar* v. *Evans*, 34 Chy. D. 470, an order had been made directing a trustee to pay a balance of the trust fund amounting to £1,596 found to be in his hands into court, and authorizing his solicitors to deduct their costs from a sum of £660, part of the £1,596 which had come to their hands. This order was made on the supposition that the trustee was solvent, but it subsequently appeared that at the time the order was made the trustee was hopelessly insolvent, and an application was then made in the cause, and in the matter of the solicitors to compel the solicitors to pay the trust fund in their hands into court without any deduction for costs, which application North, J., granted, holding that the former order was erroneous in authorizing a deduction for costs, as that could only be properly directed when the trustees was solvent and able to pay the balance into court, and notwithstanding the former order, he made the order asked against the solicitors.

ADMINISTRATION OF ESTATE—PAYMENT OF DEBTS—DEFICIENCY OF GENERAL PERSONAL ESTATE—CONTRIBUTION—PORTIONS CHARGED ON REAL ESTATE.

In *Re Saunders-Davies*, *Saunders-Davies* v. *Saunders-Davies*, 34 Chy. D. 482, is a decision of North, J., upon a question arising in an administration action. The testator devised his real estates to his widow for life, remainder to trustees to raise £5,000 a piece for each of his younger children, remainder in strict settlement. The general personal estate was insufficient to pay the debts, and consequently the specifically bequeathed personal estate, and the real estate specifically devised had to contribute to make good the deficiency, and it was held that as between the portioners and the persons entitled to the real estate, the former was not bound to contribute to make good the deficiency, and that as between the real estate and the specifically bequeathed personalty, the former must contribute in proportion to its full value without any deduction in respect of the portions.

PAWNBROKER—REDEEMABLE PLEDGES—EXECUTION.

The short point decided by North, J. *In re Rollason*, *Rollason* v. *Rollason*, 34 Chy. D. 495, is, that a pawnbroker's interest in redeemable pledges may be taken in execution under a *fi.-fa.*

SOLICITOR—COMMON ORDER TO TAX—RETAINER.

In re Herbert, 34 Chy. D. 504, it was held by North, J.; that although under the common order to tax a solicitor's bill obtained by the client, the latter cannot dispute the retainer as to the whole bill, yet he may do so as to particular items or heads. In this case the bill of costs was divided into general costs, and costs relating to a particular matter. On the taxation the whole of the latter costs, except two small items, were taxed off as having been incurred without proper authority, and the taxation was upheld.

PRACTICE—SPECIAL INDORSEMENT—SPEEDY JUDGMENT—ORD. XIV. R. 1 (ONT. RULE 80).

Imbert-Terry v. *Carver*, 34 Chy. D. 506, was a motion for judgment under Ord. xiv., r. 1 (Ont. Rule 80). The writ was indorsed with claims for foreclosure or sale, and a receiver, besides payment of the debt and interest, and it was held by North, J., that it was not a specially indorsed writ within the meaning of Ord. xiv., r. 1, and the motion was refused.

POLICY OF LIFE INSURANCE—WIFE AND CHILDREN.

In re Seyton, *Seyton* v. *Satterthwaite*, 34 Chy. D. 511, North, J., dissented from a decision of Chitty, J., *In re Adams*, 23 Chy. D. 525. The point for decision was the proper construction of a policy of life assurance taken out on the life of the assured, for the benefit of his wife and children. It was contended that the wife was entitled to the whole amount of the policy for life with remainder to the children, but North, J., held that the wife and children were equally entitled as joint tenants.

WILL—CONSTRUCTION—MISDESCRIPTION.

In re Knight, *Knight* v. *Burgess*, 34 Chy. D. 518, is another case of construction. A testator by his will gave the lease of the house in which he should be living at the time of his decease to his wife. At the date of the will he was living in a house which he held for a short term at a rack rent; about six years afterwards he purchased a freehold house, to which he removed, and in which he died. It was claimed by the widow that the freehold house passed under the devise of the lease, but North, J., held that it did not.

CHARITABLE BEQUEST—SCHEME.

A question arose *In re Lea*, *Lea* v. *Cooke*, 34 Chy. D. 528, whether a legacy of £4,000 be-

queathed to "General" Booth—the head of the Salvation Army—"for the spread of the Gospel," could properly be paid to him without a scheme being first settled by the court for its application; and it was held by North, J., that it was not necessary to settle any scheme, but that its application might properly be left at the "General's" discretion.

GARNISHEE—EXECUTION CREDITOR—PRIORITY—PARTNER—RIGHTS OF PRINCIPAL AND SURETY.

Several points of law were decided by Stirling, J., in *Badely* v. *Consolidated Bank*, 34 Chy. D. 536. It is, however, necessary to notice only some of them here. In the first place he held, following the principle laid down in *Eyre* v. *McDowell*, 9 H. L. C. 619, and *Ex. p. Whitehouse*, 32 Chy. D. 512, that a garnishee order only binds the beneficial interest of the debtor in the debt attached, and that where a valid charge has been created on the debt attached, prior to the garnishee order, the charge is entitled to priority over the garnishee order, even though the chargee have not previously notified the garnishee of his charge. On the same principle he also held that execution creditors were not, under their executions, entitled to seize the property of a third person, which such third person had permitted the execution creditor to retain in his possession and deal with as his own. He also held that where it was agreed by deed that a lender should advance money to a railway contractor; and the contractor, by way of security, assigned to him the benefit of his contract with the railway company and all the materials employed by him; and covenanted to repay all advances within six months, and the lender was to receive interest and one tenth of the profits, that upon the construction of the whole deed and the correspondence between the parties, the deed was a device and that the lender was a partner with the contractor, and as such was liable to indemnify a person who had a claim against the contractor, arising out of a guarantee given in connection with the contract. He further held that the rights of a surety against his principal are not exactly the same as those of the creditor to whom the surety is liable, and that although a creditor who has recovered judgment against one partner cannot sue another partner, yet that rule does not take away the rights of a surety of one partner as against another partner.

STATUTE OF LIMITATIONS, 3 & 4 W. 4, c. 27, s. 6—(R. S. O. c. 108, s. 7)—ADMINISTRATOR—CHATTEL REAL.

In re Williams, Davis v. *Williams*, 34 Chy. D. 558, is a decision of Stirling, J., upon the construction of the Statute of Limitations (see R. S. O. c. 108, s. 7), relating to chattel interests. This section provides that an administrator claiming chattel interests of the deceased shall be deemed to claim as if there had been no interval of time between the death of the deceased and the grant of letters of administration. The question raised was, whether under this section the time began to run under the Statute, from the death of the intestate, or the grant of letters of administration. Stirling, J., held the time ran from the death, and, but for this case, we should have thought the point too plain for argument. Counsel for the plaintiff ingeniously but unsuccessfully argued that the effect of the expression "no interval of time" must be, to bring the two events together, and, that therefore, time only runs from the grant. An important point was also decided *In re Bronson & Smith*, which is reported in a note to this case on p. 560, viz.: that where a legacy is charged on land in favour of a person who has died an infant, sec. 7 applies, and the time will begin to run under the Statute from the death of the legatee, and the legacy will be barred at the end of the statutory period, whether administration has been granted to the deceased legatee's estate or not.

STATUTE OF LIMITATIONS—ACKNOWLEDGEMENT OF DEBT.

In re Bethell, Bethell v. *Bethell*, 34 Chy. D. 561, was an action commenced in 1885, for the administration of C. Bethell's estate. A person brought in a claim for £541 16*s.* 7*d.*, of which £441 16*s.* 7*d.* was for commission and moneys lent before March, 1878, and £100 was in respect of a cheque undated, given by C. Bethell in March, 1878, and accepted by the claimant in discharge of a larger sum. The debtor went to the Cape of Good Hope in 1878, and died there in 1884. While on shipboard he wrote a letter asking the claimant to make out his account, and send it to him, and said: "I will send it you as soon as possible." The account was sent in March, 1878, and he afterwards wrote letters to the claimant, in which he said: "I will send you

a cheque as soon as I can," and "I will send some coin home as soon as ever I can." It was held by Stirling, J., that as to the £441 16s. 7d., there had not been an acknowledgment sufficient to enable the court to infer an absolute promise to pay; and as to the cheque, it appeared that at the time of drawing it C. Bethell had not sufficient funds at his bank to meet it, and was negotiating a loan which he expected shortly to complete, and out of which the cheque would be paid. The loan was not completed, and the claimant was informed of the fact. The cheque remained undated, and was never presented, and it was held that the six years began to run when the letters was received stating that the contemplated loan would not be carried out, and that the claim was therefore barred.

SPECIFIC PERFORMANCE—POWER TO WITHDRAW—LAND INDEFINITE—LAND BELONGING TO ANOTHER—CONTRACT BY LETTERS.

Wylson v. *Dunn*, 34 Chy. D. 569, is the only case which remains to be noted. In this case Kekewich, J., had to consider several difficult questions arising out of the law regulating the specific performance of contracts. A proposal having been made that the two plaintiffs should buy a field of three acres, and that the defendant should then buy half an acre of it from them, one of the plaintiffs met the defendant on the field. The defendant wished to have a piece in one of the angles, and the plaintiff stepped so as to mark where a base line would cut off half an acre. Some days afterwards the same plaintiff wrote to the defendant asking her to let them have a letter agreeing to purchase the half-acre she had selected for £350, and, without expressly referring to this letter, the defendant wrote back stating that she was willing to take half an acre of the land as agreed upon for £350. The plaintiffs three months afterwards, on 4th November, obtained a contract with the owner for the purchase. On the 13th November the defendant threatened to withdraw, and on the 20th November her solicitors wrote that she did withdraw from the contract.

This action was brought to compel specific performance. As to the description of the half-acre, it was contended that it was uncertain; but Kekewich, J., was of opinion that the parties must be considered as having determined the exact piece of land to be taken, and that the exact location of the boundary was a mere question of measurement. He was also of opinion that the two letters together constituted a valid contract under the Statute of Frauds, and that the fact that the first letter was signed by only one of the plaintiffs was immaterial, because it was binding on the plaintiff who signed it, and it might be proved by parol that he was acting as agent for his co-plaintiff. He further held that, although on the ground of want of "mutuality" the defendant could have withdrawn from the contract at any time before the plaintiffs had actually purchased the property from their vendor, yet, that as soon as that contract had been concluded, the defendant's right of withdrawal on that ground was at an end: and that the doctrine of want of mutuality being a bar to specific performance does not apply to a contract, which to the knowledge of both parties, cannot be enforced by either, until the occurrence of a contingent event.

SELECTIONS.

LIABILITY OF PULLMAN CAR COMPANY.

In *Whitney* v. *Pullman Palace Car Co.*, Massachusetts Supreme Judicial Court, Jan. 6, 1887, the plaintiff, who had purchased a ticket to ride in a day parlour car of the Pullman Palace Car Company, had in her possession, and kept under her own personal control, a satchel containing valuables, and on reaching a station on the railroad on which the car was run, she, with her husband, left the car for a period of several minutes, leaving the satchel upon the window-sill in the car, from which it could be reached from the outside through an adjoining window, from which place it was stolen. *Held*, that the plaintiff was guilty of negligence in the care of her property, and

that the car company was not liable. And in *Lewis* v. *New York Cent. Sleeping-Car Co.*, Massachusetts Supreme Judicial Court, Jan. 7, 1887, it was held that a sleeping-car company is bound to use reasonable care to guard a passenger on its cars from theft, and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable. Also that the fact that the company has posted a notice in its cars in which it disclaimed liability for the loss of valuables by passengers cannot be availed of by way of a defence to an action by a passenger whose money, which he had placed beneath the pillow in his berth on going to sleep, was stolen, where it appears that the passenger did not see or know of such notice. So, in an action against a sleeping-car company by a passenger for money stolen from his berth while he was asleep, the fact that another passenger lost a sum of money in a similar manner at the same time is itself some evidence of the want of proper watchfulness by the porter of the car; and where there was evidence that the porter was found asleep in the early morning, and that he was required to be on duty for thirty-six hours continuously, which included two nights, a case is presented which must be submitted to the jury to determine whether or not there was negligence on the part of the company in guarding its passengers. The court said: "Where a person buys the right to the use of a berth in a sleeping-car it is entirely clear that the ticket which he receives is not intended to and does not express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket. Ordinarily, the only communication between the parties is that the passenger buys, and the agent of the car company sells, a ticket between two points; but the contract thereby entered into is implied from the nature and usages of the employment of the company. A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and when it sells a ticket it impliedly stipulates to do so. It invites passengers to pay for and make use of its cars for sleeping; all parties knowing that during the greater part of the night the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, lock the door and guard against danger. He has no right to take any such steps to protect himself in a sleeping-car, but by the necessity of the case is dependent upon the owners and officers of the car to guard him and the property he has from danger, from thieves or otherwise. The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier, or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft, and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it." See *Illinois Cent. R. Co.* v. *Handy*, 63 Miss. 609; *Bevis* v. *Balt. and Ohio R. Co.*, St. Louis Circ. Ct., 1 Ry. & Cory. L. J. 103.—*Albany Law Journal.*

SYMPATHY WITH CRIME AND CRIMINALS.

Our attention has been attracted to a communication to the *Nation* in which the writer says:

"I have a psychological question to propose: What is the exact state of mind under analysis of the small newspaper writer who always speaks of crime jocosely? Everybody must have observed it as one of the many ways in which the vulgar newspaper tends to vulgarize the public. For example why 'boodle alderman?'"

He then suggests that, perhaps, the cause of this peculiar predilection is that these jocose and slangy writers have a "secret and constitutional sympathy with crime." This is a hard saying and a harsh judgment. We freely acquit the witlings of the gallows and "pen" school of journalism of anything worse than a "plentiful lack of wit" (in every sense) and execrable taste. They offend in this sort, simply because they do not know any better, and yet their folly bears its evil fruit. The familiar and *quasi* funny

manner in which crimes are spoken of in the public prints tends to lessen in many minds the abhorrence in which should be held the offence and the offender. The defaulting cashier is, in point of fact, and in the language of sober sense, a fugitive from justice, an absconding felon whose deliberate thefts have brought suffering upon many, and ruin upon not a few innocent people. By these silly scribes he is denominated a "gay and festive cuss" who has "skipped" to Canada with his "boodle."

There is prevalent, however, a mode of manifesting sympathy, not with crime, but with criminals, which is far more detrimental to the interests of justice and the due administration of the law than the facetious folies of the funny man of the newspaper.

It often happens that as soon as a notorious criminal has been convicted, especially if he is a man of any note or of respectable antecedents, a reaction sets in, and the righteous indignation of an outraged community sensibly abates. The pendulum swings farther in the reverse than in the primary direction, and the next thing in order is a petition for the pardon of the offender, or at least for a mitigation of his punishment. The responsibility of people who sign these petitions is much graver than they usually realize. It is true that the executive is the actual pardoning power, but governors are *ex vi termini*, politicians, and the chief function of a politician, as he understands it, is to please the people. When, therefore, a petition of this description, signed by a large number of respectable citizens, is presented to the average governor, he will believe, or affect to believe, that the petitioners really mean what they say, and that the case presents a suitable occasion for the exercise of executive clemency. Everybody knows how easily such petitions are gotten up, that many sign thoughtlessly, many from indifference, many because they cannot say "no" to anything, many because they fear to offend the promoters of the proposed pardon, many because they are willing to "give the poor devil another chance," and not one in a hundred because he really believes, from even approximate knowledge of the facts, that the case is such as the petition represents it to be, or such as will justify executive interposition. And so the governor shifts the responsibility to the broad back of the "sovereign people," in the persons of the petitioners, justice is defeated, and the administration of the law is put in open shame.

That the pardoning power is often abused by undue leniency has long been a matter of complaint in many of the States. In some of them a remedy has been applied in the shape of a pardoning board, the procedure of which is of a judicial character. The fact remains, however, that much of the miscarriage of justice growing out of undue clemency is chargeable to the misplaced sympathy with criminals of impulsive and ill-balanced people. Such men sometimes swing from one extreme to the other, and although before conviction they may have been ready to violate the law themselves by lynching the offender, they afterwards became active workers for his pardon. The responsibility of undeserved pardons and mitigations of punishment should rest scarcely less upon indiscreet and unreasoning sympathizers than upon the executive himself.—*Central Law Journal.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

PRACTICE.

Boyd, C.] [April 22.

REGINA v. HALL.

Canada Temperance Act—Conviction—Adjournment to consider of judgment—32 & 33 Vict. c. 31, s. 46—Evidence—Certiorari.

Upon an information for an offence against the Canada Temperance Act a police magistrate heard all the evidence within the proper time, and at the close of the evidence announced in presence of the parties that judgment would be reserved for two weeks from that day—at which appointed time judgment was duly pronounced.

Held, that 32 & 33 Vict. c. 31, s. 46, which is to be read with the Canada Temperance Act by virtue of s. 107, applies only to an adjournment of the hearing or the further hearing of the information or complaint, which is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed. Justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case.

Notwithstanding the adjournment after the close of the hearing for fourteen days in order to consider of and give judgment, the police magistrate had jurisdiction, and the conduct of the proceedings was not even irregular.

Regina v. *French*, 13 O. R. 80, distinguished.

There was an amendment of the original information by changing the date of the offence from the 10th to the 23rd of February, and the parties agreed that the evidence taken should stand for the purposes of the amended charge instead of having a needless repetition of it.

Held, that this course was unobjectionable.

The defendant's application for a *certiorari* was refused with costs.

Walter Read, for the defendant.

Aylesworth, for the magistrate.

Boyd, C.] [April 25.

MCCARTHY v. COOPER ET AL.

Costs—Set-off—Rule 436—Solicitor's lien.

Under Rule 436 a discretion is allowed as to whether or not there shall be a set-off of costs in the same action where costs are awarded to and against the parties; equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter.

A direction to set-off costs was properly refused under the following circumstances: The plaintiff succeeded at the trial of the action, which was for specific performance of a contract for the sale of land and was given costs up to trial; on reference to a Master the plaintiff failed to shew title, and was ordered to pay to the defendant his costs subsequent to the trial, and to repay $500 of the purchase money which had been paid by the defendant; the defendant's solicitor asserted a lien upon the sum due by the plaintiff for costs, which could be recovered upon the bond given by the plaintiff for security for costs, whereas the $500 could not be recovered against the plaintiff, who was worth less.

W. H. Blake, for the plaintiff.

E. T. English, for the defendant.

Mr. Dalton, Q.C.] [April 25.

TOWN OF PETERBORO' v. MIDLAND RY. CO. ET AL.

Pleading—"Not guilty by statute"—Action for specific performance of contract.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract; and the defence of not guilty irrespective of statutory authority is not admissible under the Judicature Act.

Watson, for the plaintiffs.

Aylesworth, for the defendants.

MUNICIPAL CASES.

RE HILBORN AND THE MUNICIPALITY OF PICKERING.

Ditches and Watercourses Act—Award of engineer—Parties affected by Act notified—Setting aside—Costs.

DARTNELL, J.J.—The award of the engineer directing the construction and maintenance of a ditch, the discharge from which would injuriously affect the interests of others, was set aside, because the parties so affected were not notified of the proceedings.

DIVISION COURTS.

CENTRAL BANK v. HODGSON; BICKLE, Claimant.

Interpleader—Claim for exemption—Chattel ordinarily used in the debtor's occupation.

DARTNELL, J.J.—A buggy used by a miller might be a chattel ordinarily used in his occupation, but the debtor having ceased to work at his employment,

Held, that he was not entitled to its exemption.

NOTES FROM UNITED STATES REPORTS.

BULLARD v. BOSTON & MAINE RAILROAD.

Trial—Statements by counsel not in evidence.

When counsel in argument makes a statement of a material fact not in evidence, against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of presenting and proving his claim that the decision was not affected thereby.—New Hampshire Supreme Court.—*Albany L. J.*, Nov. 13, 1886.

FOLLMAN v. CITY OF MANKATO.

Negligence — Contributory negligence of driver of private carriage—Injury to guest.

One who while riding in the private carriage of another, at his invitation, is injured by the negligence of a third party (a municipal corporation), may recover against the latter, notwithstanding the negligence of the owner of the carriage in driving it may have contributed to produce the injury, the plaintiff being without fault, and having no authority over the driver.—Minnesota Supreme Court.—*Ib.*

COLE v. MCKEY.

Landlord and tenant—Defect in premises—Liability of landlord to repair.

In the absence of any secret defect, deceit, warranty, or agreement on the part of the landlord to repair, he cannot be held liable to the tenant, or any one rightfully occupying under him, for an injury caused by the leased premises getting out of repair during the term, unless it be by reason of his own wrongful act, or failure to perform a known duty. This principle extends to cases where premises are leased to several tenants, and the injury has been caused by a defect in parts used by all of them in common, like halls and stairways.

Where a landlord has been guilty of some wrongful act or breach of positive duty in not repairing leased premises, he is not liable for an injury caused thereby to one occupying the premises without rightful authority, as to a subtenant in possession contrary to the terms of the original lease.—Wisconsin Supreme Court.—*Ib.*, Nov. 20.

SAGINAW GAS LIGHT CO. v. CITY OF SAGINAW.

Municipal corporation—Regulations for lighting streets—Grant of monopoly.

Authority "to cause the streets of a city to be lighted," and to make "reasonable regulations" with reference thereto, does not empower the city government to grant to one company the exclusive right to furnish gas for

thirty years, and such right is not legally "impaired" by a subsequent contract with another company to light the streets with electricity. Mich. Circuit Ct.—*Ib.*

COMMONWEALTH v. BRIANT.

Sale of intoxicating liquors to minor by agent.

Defendant, who was duly licensed to sell liquors to be drunk on the premises, was indicted for selling to a minor. It was claimed that the sale was made by the bartender without defendant's authority. On the trial the court instructed the jury that a sale by a bartender in his master's shop, and in the regular course of his master's lawful business, is *prima facie* a sale by the master, although the sale is an illegal sale; but that such a sale may be explained by showing that it was unauthorized. *Held*, error; that although it was evidence for the jury to consider, and which might warrant it in inferring that the sale was authorized by the defendant, yet that it was going too far to hold that it raised a presumption of fact that such was the case. The fact that a man employs a servant to conduct business expressly authorized by statute, and that the servant makes the unlawful sale in the course of it, do not necessarily overcome the presumption of innocence merely because the business is liquor selling, and may be carried beyond the statute limits. *Com.* v. *Putnam*, 4 Gray, 16; *Com.* v. *Dunbar*, 9 id. 298. It is true that a master would be liable civilly for such a sale as supposed in the instruction, but his civil liability exists even when he prohibits the sale, and therefore it does not stand upon a presumption that he authorized the sale, but upon the general ground of a master's liability for the unauthorized torts of his servants, whatever they may be. *George* v. *Goodey*, 128 Mass. 233; *Roberage* v. *Burnham*, 125 id. 277; Pub. Stat., ch. 100. § 24; *Byington* v. *Simpson*, 134 Mass. 169, 170. *Com.* v. *Holmes*, 119 id. 195, cited for the prosecution, went no further than to decide evidence that the defendant's son and clerk sold intoxicating liquors in a public house kept by the defendant was evidence of sale by the defendant sufficient to be submitted to the jury. See *Com.* v. *Edes*, 14 Mass. 406. Nothing was said as to a presumption of fact. The evidence too was stronger than the case at bar. For there the defendant set up no license, and any sale was unlawful, and the question was whether the defendant gave authority to his clerk to sell at all. It might well be thought that the clerk would hardly undertake to sell in the way of business in his employer's house without some authority. But it is obviously much more likely that a servant employed to make lawful sales should occasionally go beyond his authority, which he might do by his taking a minor for an adult, than that he should go into a wholly unauthorized business. *Com.* v. *Nichols*, 10 Metc. 259, probably suggested the ruling of the court, and is perhaps a little nearer the case at bar than *Com.* v. *Holmes*, as the defendant seems to have sold liquors wholesale, and to have employed his clerk in that business, although not licensed to sell at retail. The court, in sustaining the defendant's exceptions, said a sale at retail by the clerk was only *prima facie* evidence of a sale by the master. It hardly said, and could not have decided, that such a sale was *prima facie* a sale by the master, or that it raised a presumption of fact. Moreover, if it were held that there was such a presumption of fact, in cases like *Com.* v. *Holmes* and *Com.* v. *Nichols*, it would not follow that there was the same presumption in the present case, still less that it was so plain that the jury could be instructed to act on it. Such presumptions are questions of fact and of degree. Mass. Sup. Jud. Ct.—*Ib.*, Nov. 27.

PEOPLE v. MONDON.

Criminal law—Evidence — Prisoner's testimony at coroner's inquest.

Defendant was an Italian labourer, having an imperfect understanding of the English language. He was under arrest, without warrant, charged with murder. A coroner's inquest was being held. The prisoner was taken by the sheriff, in whose custody he was, and whose power he could not resist, before the coroner's inquest then engaged in an investigation against himself. He did not go there voluntarily. He was sworn by the coroner as a witness: was without counsel, and without means to employ counsel. He was

not informed that he could not be compelled to be a witness against himself, nor that he need not give an answer which would tend to criminate himself.

Held, that the prisoner's attendance before the coroner was compulsory, and the testimony taken was involuntary and inadmissible under the Constitution. New York Court of Appeals, Oct. 5, 1886.—*Ib.*, Nov. 27.

Annes v. Milwaukee & N. R. Co.

Carriers—Limitation of liability by contract—Free pass—Ordinary negligence.

Where the acceptance of a gratuitous pass from a railroad company "assumes all risks of accident, and especially agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to his person," the contract relieves the company from liability for injury to him by reason of a want of ordinary care of its servants, unless the same is expressly made a crime, but not from liability for gross negligence.—Wisconsin Supreme Court.—*Ib.*, Jan. 22, 1887.

United States v. Rauscher.

Extradition—Trial for another crime.

The defendant, being charged with murder on board an American vessel on the high seas, fled to England, and was demanded of the Government of that country, and surrendered on this charge. The Circuit Court of the United States for the Southern District of New York, in which he was tried, did not proceed against him for murder, but for a minor offence not included in the treaty of extradition.

Held, 1. That a treaty to which the United States is a party is a law of the land, of which all courts, State and National, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement.

2. That on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and acts of Congress on that subject, he cannot lawfully be tried for any other offence than murder.

3. The Treaty, the acts of Congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offence, until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offence specified in the demand for his surrender. The national honour also requires that good faith shall be kept with the country which surrendered him.—Supreme Ct. U. S.—*Ib.*, Feb. 5.

Cottrell v. Babcock Printing Press Manufacturing Company.

Good-will—Sale of—Solicitation of trade.

A partner, who upon dissolution of the partnership purchases the good-will, secures merely the right to conduct the old business at the old stand, and in the absence in the contract of dissolution of stipulations to the contrary the retiring partner may lawfully establish a similar business, even in the neighbourhood, and by advertisement, circular, card and personal solicitation invite the public generally, including the customers of the old firm, to come there and purchase of him.

But trade must be so solicited as not to lead any one to believe that the machinery offered for sale is manufactured by the partner who purchased the good-will, or that he is the successor to the old firm, or that the owner of the good-will is not carrying the business formerly conducted by the old firm.—Supreme Court, Connecticut.—*Ib.*, Feb. 12.

CORRESPONDENCE.

45 *VICT. CH.* 11, *SEC.* 6, *ONT.*

To the Editor of the Law Journal:

Sir,—Will any of your learned readers explain why 45 Vict. cap. 11, sec. 6, Ont., was enacted? What is the effect of the enactment?

Yours truly, Inquirer.

Kingston, April 29, 1887.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Negligence in imminent peril.—*American Law Register*, October, 1886.

Warranties and conditions in sales.—*American Law Review*, September—October, 1886.

Should trial by jury be abolished in civil cases.—*Ib.*

The legal aspects of industrial copartnership.—*Ib.*

Assignments of patents.—*Ib.*

An attorney's general or retaining lien (1. Introductory; 2. Upon papers and property; 3. Upon moneys collected).—*Ib.*

An attorney's special lien on judgments.—*Ib.*, November—December, 1886.

Limited partnerships.—*Ib.*

Foreclosure of railway mortgages.—*Ib.*

The responsibility of banks and bankers for their correspondents and their notaries.—*Ib.*

Equity of partnership creditors.—*Albany Law Journal*, November 6.

The labour question.—*Chicago Law Times*, November, 1886.

The legal aspects of the boycott.—*Ib.*

Our Grand Jury system.—*Criminal Law Magazine*, December, 1886.

The boycott and its methods.—*Ib.*, January, 1887.

Homicide by mob—Evidence of motive—Conspiracy.—*Ib.*

Distribution of assets on mistaken construction of will.—*Irish Law Times*, October 23, 1886.

Unauthorized expenditure by directors.—*Ib.*, November 6.

Negligence of railway passenger in immediate peril.—*Ib.*, November 13.

Are shares in companies choses in action.—*Ib.*, December 11.

The fiduciary position of company promoters.—*Ib.*, *et seq.*

Attaining majority.—*Ib.*, February 5, 1887.

Construction of covenants in restraint of trade.—*Ib.*, February 12.

The currency of post office orders.—*Law Journal*, England, February 12.

Jurisdiction over estates of insane persons.—*American Law Review*, January—February.

Strikes and boycotts as indictable conspiracies at common law.—*Ib.*

The principle of *stare decisis* considered.—*American Law Register*, December, 1886.

The law of subscriptions (Consideration for voluntary subscriptions—Whether a payee must be named—Withdrawal—Joint or several—Dependent on, or independent of total amount being subscribed—Misrepresentation—Release of unpaid subscriptions—Conditions precedent to recovery on).—*Ib.*, January, 1887.

Limitations on legislative contracts.—*Ib.*, Feb.

Sale of personal property to defraud creditors.—*Central Law Journal*, November 5, 1886.

The doctrine of imputed negligence as applied to children.—*Ib.*, November 12.

The rule as regards fixtures as between vendor and vendee.—*Ib.*, November 19.

Nuisance by noise in a private house.—*Ib.*, November 26.

Names of corporations (Must have name—More than one—How acquired—Failure to name—Change of—Protected in use of—Suits—Misnomer and variance—Deeds, grant, devises).—*Ib.*, December 3.

Liabilities of railway companies for injuries to their employees.—*Ib.*, December 10.

Duress (Definition of—Who may avail himself of—Classes of—Criminal cases).—*Ib.*, January 28, 1887.

Covenant by railway company to do certain things in consideration of grant of right of way—What runs with land.—*Ib.*

Power of a corporation to remove directors for cause.—*Ib.*, February 4.

Municipal liability for defective sewerage.—*Ib.*, February 11.

Liability of joint executors.—*Ib.*, February 18.

Implied warranties in the letting of premises.—*Ib.*

Libels on the dead.—*Irish Law Times*, Feb. 26.

The English County Court system.—*Law Quarterly Review*, January.

The international copyright union.—*Ib.*

Possession in the Roman law.—*Ib.*

Compensation for misdescription in sales of land.—*Ib.*

ALL who know Judge Bleckley and recall his long waving hair and beard will appreciate this story: He was on his way to the Supreme Court one morning, when he was accosted by a little street gamin, with an exceedingly dirty face, with a customary "Shine, sir?" He was quite importunate, and the judge, being impressed with the oppressive untidiness of the boy's face, said: "I don't want a shine, but if you will go wash your face I will give you a dime." "All right, sir." "Well, let me see you do it." The boy went over to an artesian hydrant and made his ablution. Returning, he held out his hand for the dime. The judge said: "Well, sir, you've earned your money, here it is." The boy said: "I don't want your money, old fellow; you take it and have your hair cut," saying which he scampered off. The judge thought it so good a story that he told it himself.—*Augusta Chronicle.*

FLOTSAM AND JETSAM.

THE case of a would-be suicide refusing to pay the doctor who saved his life, is matched by an incident which occurred in Berlin, and which is now just going the round of the German medical journals, concerning a man who went into a beer-shop and poisoned himself there. The landlord despatched his daughter for a doctor, who did what he could for the man, and sent him to the hospital. When he recovered he refused to pay the doctor on the ground that he had not desired his services. The police, too, declined to settle the account, as also did the landlord. It amounted only to the modest sum of four shillings. The Berlin Medical Defence Society then took the matter up and sued the landlord, who in turn was defended by the Publicans' Society; and, though the matter has now been in litigation for more than four years, the doctor, instead of getting his four shillings, has had to pay the costs, which, to us, considering the circumstances, appear little enough, being only £2 7s. 3d., yet, nevertheless, too much good money to throw after bad.—*Central Law Journal.*

A DAILY paper publishes the following:

"The famous Blue Grotto of Capri has given rise to one of the most curious lawsuits which have ever been heard. The *Vita Napolitana*, writing on the subject, says that some years ago an American became possessor of that part of Capri under which the Blue Grotto is situated, and the owner asserts now that as the surface of the ground belongs to him, he is also the owner of everything below it, which in this case happens to be the grotto, which, however, is at present the possession of the little town of Capri, the administration of which has not the slightest inclination of giving up what is its own to the Yankee. The latter, on being informed of this, has begun a lawsuit, the consequences of which, whether he wins or loses the case, may be very serious. In the former case he can permanently injure the grotto by making a hole through the ceiling, by which the marvellous reflections in the interior will be lost forever. If he wins it, the chances are that he will close it to the public."

We have not the pleasure of having the *Vita Napolitana* among our exchanges, but we have no doubt our Canadian *confrère* has cited its paragraph correctly. What the Italian law on the subject may be we do not know; but we should think that if the American plaintiff has not the right to the grotto, he can hardly have the right to bore a hole into it, which would utterly destroy its value, and do him no good. His countrymen would hardly wish to kill all the fish within the three-mile limit—a parallel case.

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee ror Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887. 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

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DIARY FOR JUNE.

4. Sat.....Easter sittings end. Lord Eldon born, 1751.
5. Sun.....*Trinity Sunday.*
12. Sun.....*1st Sunday after Trinity.*
13. Mon.....C. C. York term begins.
14. Tues...C. C. sittings for trials commence, except in York.
15. Wed...Magna Charta signed, 1215.

TORONTO, JUNE 1, 1887.

A SPECIAL sitting of the Division Court of the Chancery Division is to be held, commencing on the 13th June inst. Practitioners will do well to remember that the practice regulating proceedings before this branch of the High Court is governed by Rules 522, 523.

HAPPENING recently to pass by the Convocation Hall while the students' examinations were going on, we observed that one of the examinants was hard at work in his shirt sleeves. It was satisfactory, however, to find the examiners were seated on the platform in professional attire, and the other examinants were able to keep their coats on.

We presume the coatless gentleman was going in for honours, and was wrestling with a personified fiend of equity jurisprudence, or a lusty problem in common law.

The writer remembers once in one of the hottest days of a hot vacation that an athletic law student appeared on a taxation before the then clerk of the Common Pleas in his shirt sleeves. No sign of fear, however, crossed the face of that inexorable official, as he majestically informed the hot young man from the country that he and his room were preferable to his company, even though, without his coat, he was invisible to the quasi-judicial eye.

SOME amusing incidents occasionally occur to the judges on their visits to the various county towns. A late learned Chancellor of Ontario once gave directions to a Deputy Registrar to telegraph to a hotelkeeper at the next town he was to visit, to inform him that he was coming, and to request him to make the requisite preparations for his reception. The Deputy accordingly telegraphed to Boniface, "The Chancellor will be at your place at noon, make all necessary preparations." On his lordship's arrival at the appointed hour, however, no preparations had been made for him, and somewhat disgusted at the apparent inattention, he inquired of the defaulting landlord if he had not received a telegram announcing his arrival. The landlord was profuse in his apologies, and assured him no such message had been received. In fact, said he, "the only telegram I have received for a week past is one saying, that the stud horse 'Chancellor' will be at my place to-day, and to get the box-stall ready for him, which I have done"!

MOST circuit goers have heard how a former Chief Justice was once met at his hotel door by a certain Sheriff and four seedy looking bailiffs, with a view to escorting his lordship in state to the Court House, and how, when the learned judge had learnt the purpose of Mr. Sheriff, he thus addressed him: "Mr. Sheriff, if you and your men will kindly go that way (pointing to the right), I will go this way (pointing to the left)—Good morning."

THE REVISED STATUTES OF CANADA.

THE revision and consolidation of the Statutes of Canada having been completed by the incorporation therein of the Acts passed in the session of 1886, and brought into force on, from and after the first day of March, 1887, by proclamation of His Excellency the Governor-General, issued on the 24th day of January now last, under the Act 49 Vict. chapter 4, as "The Revised Statutes of Canada," and being printed and distributed in English, in two volumes containing 185 Acts or chapters, in 2,246 pages, with a table of contents, a general index, and an index to chapters appended to each volume, some account of the revision will be interesting and useful to our readers, the revisers having prefixed no preface or introduction to their work.

The Commission for the revision was issued in June, 1885, to the following Commissioners viz.: — Sir Alexander Campbell, K.C.M.G., Minister of Justice; James Cockburn, of Ottawa, Q.C.; Joseph Alphonse Ouimet, of Montreal, Barrister; Wallace Graham, of Halifax, Q.C.; George Wheelock Burbidge, of Ottawa, Barrister and representative of the Minister of Justice; Alexander Ferguson, of Ottawa, Barrister, and William Wilson, of Ottawa, Assistant Law Clerk to the House of Commons of Canada.

Mr. Cockburn died before, or soon after, this commission issued, having done some preparatory work only; the other six gentlemen made the report of the commission on the 31st December, 1884.

After the formal opening, the commission reads as follows:—

Whereas, it having become necessary to revise and consolidate the Statutes of Canada,

And whereas each of the Provinces of Canada before Confederation possessed legislative authority over, and passed laws with respect to matters now within the exclusive legislative control of the Parliament of Canada,

And whereas, the British North America Act, 1867, continued these laws in force until repealed or altered by the Parliament of Canada, some of which have been so repealed or altered, some remain still the laws of the Province in which they were enacted, some are local in their nature, not being capable of being extended to the whole of our Dominion of Canada; while others might properly be extended to the whole or other parts of Canada, and it is probable that some should be entirely repealed;

And whereas, certain schedules of Acts requiring examination having been previously prepared, We deemed it necessary that further examination, collection and classification of the several Statutes of Canada should be made preliminary to the proper revision and consolidation thereof, and for the purposes aforesaid did cause a commission under the Great Seal of Canada to issue to the said James Cockburn, bearing date the 15th day of November, in the year of our Lord 1881, constituting and appointing him to be, from the 1st day of July then last past, our commissioner to complete the said Schedules already prepared, and to examine the Statutes passed by the Parliament of Canada since the first day of July, in the year of our Lord 1867, and to collect therefrom all those enactments which are still in force, and to note the enactments of the Old Provincial Statutes which have been repealed or altered; also to classify all unrepealed enactments according to subjects, care being taken to distinguish those applying to one or more provinces only; and generally to make such examinations, classifications and collections of the said Statutes as might be necessary preliminary to the proper revision and consolidation thereof.

And whereas We deem it advisable that the commission, which it was proposed to constitute after the preparatory work of consolidation as aforesaid had been completed, should be constituted without delay.

Now, therefore, know ye, etc., that reposing, etc., by and with the advice of our Privy Council for Canada, etc., We do hereby constitute and appoint you the said (*names of Commissioners*) to be our commissioners to consolidate and revise the Statutes of Canada.

To have and to hold, etc., the said office of, etc., with all powers, etc., during pleasure. And we do hereby appoint you, the said the Hon. Sir Alexander Campbell, to be chairman, and you, the said William Wilson, to be the secretary of this our commission, and hereby authorize and require you to report to our Privy Council for Canada from time to time as they may require, what may have been done by you in the premises, and to

transmit to them all such tables, schedules, annotations, classifications, collections, revisions, and consolidations as may have been prepared.

In testimony, etc.

Dated 7th June, 1883.

On the 31st December, 1884, as aforesaid the Commissioners made the following report:

To His Excellency the Most Honourable the Marquess of Lansdowne, Governor-General of Canada, etc., etc., etc.

MAY IT PLEASE YOUR EXCELLENCY—

The Commissioners appointed to consolidate and revise the Statutes of Canada, have now the honour to submit a draft of the work entrusted to them.

In preparing the several chapters, care has been taken to preserve uniformity of language throughout, to remove redundancies, and to arrange the provisions of the law in the most natural sequence. To effect this it has, in very many instances, been necessary to divide chapters, and divide and transpose sections. The Interpretation Act provides that the law shall be considered as always speaking, and for that reason the present tense has been used in the consolidation.

Among the Statutes of the several Provinces, passed previous to Confederation, there are certain Acts in respect to which doubts have arisen as to the authority with which the legislative power rests. There are also Acts, both among the Statutes above referred to and the Statutes of Canada, which it has not been considered advisable to consolidate, although their repeal is not recommended. These include Acts authorizing the raising of loans by Government, Acts of indemnity, Acts relating to specific localities less than a whole Province, and Acts of a temporary character. These Acts have been collected in a separate schedule.

Another class of provisions, which make violations of Acts within the legislative power of Provincial Legislatures indictable offences, and provide for their punishment, have also been collected in a separate schedule. It is suggested that provision should be made that these should be repealed in each instance, from the time when the punishment of the offence, by fine or imprisonment, is provided for by the proper Provincial Legislature.

A table is appended to each chapter, showing what Acts are proposed to be consolidated therein, the portion consolidated, the portion which it is proposed to repeal, the portion to be consolidated elsewhere, and a note of the Act with which such latter portion is to be incorporated, and to each section is attached a reference, showing the corresponding Act and section of the Statutes now in force.

When material changes have been found necessary, a note in smaller type has been inserted, showing the nature of the change, or the new matter is printed in italics.

Ottawa, 31st December, 1884.

This report, with the draft of the work therein mentioned, was laid by order of His Excellency the Governor-General, before both Houses of the Parliament of Canada, and by them referred to a Joint Committee of the Senate and House of Commons, of which the Minister of Justice was chairman, and examined and reported by the said Committee with certain amendments.

These amendments were attended to by the Commissioners in their final Report made in the following year. They will be found in the Minutes of Proceedings of the Senate of Monday, 6th July, 1885, with the report of the Committee. They relate mainly to changes made, not in the substance, but in the expression of the law, to render it clearer and to better ensure the accomplishment of its intent. They extend to the Schedule A annexed, providing for the repeal of certain Provincial enactments; and their most striking effect is to reject the suggested repeal of enactments respecting the observance of the Lord's Day. The report of the Committee contains the following passages: "The Committee have carefully examined the consolidation and revision submitted to them." "Without retracing the whole labour of the Commissioners in preparing the draft of the proposed consolidation and revision, it was impossible for the Committee to compare with the original each of the sections represented to be transcripts of sections now in force, to verify absolutely the completeness of the consolidation, or to ascertain beyond doubt that no statutory provisions have been

omitted or repealed provisions included. The time at the disposal of the Committee did not allow more than a general examination and the application of tests to ascertain the character of the work in these respects. In the opinion of the Committee it has been well and carefully done."

"The chapters of the draft were apportioned among sub-committees, who made a careful examination, comparison and verification of all those sections of existing Statutes, which are noted in the draft as having undergone any changes in arrangement or language, as having been repealed, or in regard to which any change is suggested by the Commissioners."

"The general arrangement and execution of the proposed consolidation and revision are, in the opinion of the Committee, convenient and satisfactory."

The Commissioners having thus performed the work entrusted to them, Messrs. Wilson and Ferguson, who had been members thereof, with Mr. A. Power, of the Department of Justice, and a barrister of the Province of Nova Scotia; and Mr. J. G. Aylwin Creighton, a barrister of the Province of Quebec, the Law Clerk of the Senate, were instructed by the Government, after the close of the Session of 1885, to incorporate the Public General Acts of that Session with the reported work of the Commission, to superintend its translation into French, and generally to prepare it for publication.

The French version was prepared by Mr. Coursolles, chief French translator to the House of Commons, or under his immediate supervision.

It was found, however, that it would not be possible to have the work ready for publication before the commencement of the then next session: and on the 31st December, 1885, the gentlemen last named made the following report:

To the Honourable the Minister of Justice of Canada:

SIR,—Pursuant to the instructions which we received from you, we have incorporated with the draft submitted by the Commissioners appointed to consolidate and revise the Statutes of Canada, such of the Acts passed during the last session of Parliament as appeared to be proper subjects for consolidation therewith, and also the amendments suggested in the report of the Joint Committee of the Senate and House of Commons appointed last session to consider that draft. In the execution of this work we have adhered closely to the system and rules adopted by the Commissioners in the performance of the duties assigned to them.

We have also carefully revised, and made the additions to the Schedules to the report, rendered necessary by the legislation of last session, and we have completed the chronological and analytical table, showing in what manner each Act of Canada, and of each of the Provinces, which relate to matters within the control of Parliament, have been dealt with by the Commissioners and by ourselves.

We have also in course of preparation for publication, according to your instructions, a collection of all the statute law of a public general nature, relating to subjects within the legislative authority of the Parliament of Canada, now in force, but which in the opinion of the Commissioners could be more conveniently dealt with in this way than by consolidation.

Ottawa, 31st December, 1885.

This report was accompanied by a draft of the work in its then state, which was laid before Parliament, submitted to a Joint Committee of both Houses, reported with amendments, and being approved by Parliament as so amended, the Act now 49 Vict. c. 4 was passed, authorizing the Governor-General to cause such Public General Acts of the Session as he should deem proper to be incorporated with it, and to bring it into force on and after such time as he should appoint.

The work as now published consists of one hundred and eighty-five Acts, each forming a chapter, on some subject within the exclusive jurisdiction of the Dominion Parliament; and printed separately with the Royal Arms and the imprint of the Queen's Printers, and from stereotype plates kept by him, so that he can furnish copies of any required Act or number of Acts, or the Acts relating to any subject or class of subjects can be taken out of the volumes and bound or stitched separately.

a great convenience to professional men, or officers of departments, or others, requiring to have the Statute Laws on any matter in a handy and portable form.

In this portion of their work the Commissioners have followed generally the order and lines of the Consolidated Statutes of the old Province of Canada, and of Upper and Lower Canada, and have indicated at the end of each section the sources from which it has been taken or derived, thus affording easy means of finding the date at which any provision became law, a facility not given in the Revised Statutes of the Maritime Provinces or British Columbia; and they have also here given effect to the provision in their commission empowering them to collect and classify Provincial enactments still in force on subjects under the exclusive jurisdiction of Parliament, by inserting such enactments in the chapters on the matters to which they respectively relate, distinguishing them clearly as applying only to the Provinces by the Legislature whereof they were passed. When such Provincial enactments contain provisions of like effect with those of sections of the Revised Statutes, they are incorporated with them, and referred to as being so; otherwise, if they are intended to apply to the whole Dominion, they are made separate sections, and their origin indicated; but if, though they relate to the subject of the chapter, they are not so to apply, the Province or Provinces to which only they are to apply are indicated. Provincial enactments thus extended to a Province or Provinces to which they did not before apply, will, of course, be so extended only from the coming into force of the Revised Statutes (1st March, 1887). Many such Statutes are repealed, such repeal taking effect from the same date.

Schedule A, hereinafter mentioned, contains a list of all Acts so repealed, whether of the Dominion of Canada or of any of Provinces thereof. The following chapters will be found to extend, or to act as extending, to the Dominion, or to set forth and declare as applicable only to a Province or Provinces named, enactments of Provincial Legislatures:

Chap. 123. Bills of exchange and promissory notes.
Chap. 127. Interest.
Chap. 144. Application of criminal law of England to Ontario and British Columbia.
Chap. 147. Riots and unlawful assemblies.
Chap. 148. Improper use of weapons.
Chap. 152. Peace at public meetings.
Chap. 157. Offences against public morals and convenience.
Chap. 159. Lotteries and betting.
Chap. 161. Offences relating to the law of marriage.
Chap. 163. Libel.
Chap. 164. Larceny and similar offences.
Chap. 165. Forgery.
Chap. 168. Malicious injuries to property.
Chap. 173. Threats, intimidation, etc.
Chap. 174. Procedure in criminal cases.
Chap. 179. Recognizances.
Chap. 180. Fines and forfeitures.
Chap. 181. Punishments.
Chap. 183. Public and reformatory prisons.

After the chapters Volume II. contains Schedule A:—"Acts and parts of Acts repealed, from the date of the coming into force of the Revised Statutes of Canada, so far as the said Acts and parts of Acts relate to matters within the legislative authority of the Parliament of Canada." Of the Consolidated Statutes of (the Province of) Canada it repeals the whole or parts of 44 Acts; of the Consolidated Statutes for Upper Canada, 39; of the Consolidated Statutes for Lower Canada, 31; of the Acts of the late Province of Canada, 101; of the Acts of Nova Scotia (revised and since revision), 86; of the Statutes of New Brunswick (revised and since revision), 147; of the Revised Statutes of British Columbia, including those of the former colonies of Vancouver Island and British Columbia, 61; of the Statutes of Prince Edward Island (revised and since

revision), 173 (all these being, of course, Statutes respecting matters now subject to the exclusive control of the Parliament of Canada, and passed before the coming into force of the B. N. A. Act, 1867, after which no such Provincial Statute could be legally passed); and of public general Statutes of the Parliament of Canada, 612; making the total number of Statutes so repealed, in whole or in part, 1294.

Schedule B:—"Acts and parts of Acts of a public general nature, which affect Canada, and have relation to matters not within the legislative authority of Parliament, or in respect to which the power of legislation is doubtful, or has been doubted, and which have in consequence not been consolidated; and also Acts of a public general nature, which for other reasons have not been considered proper Acts to be consolidated." In this table the portion of each Act as to which the Commissioners entertained the doubts mentioned is given in the outer column, and the subject of the Act is shown by the title given in the centre column, except as to the Act 29 Vict. (1865, 2nd session) of the Revised Statutes for Lower Canada, as to which the outer column indicates only the numbers of the Articles of the Civil Code of Lower Canada brought into force by proclamation under the said Act, which the Commissioners, for reasons other than those mentioned in the heading to the said Schedule B, have not considered proper Acts to be consolidated. It may be useful to mention here the subjects of said Articles, which are as follows:

Arts. 12 to 21. Interpretation of laws and terms used in them.

Art. 23. Status of alien woman married to British subject.

Pars. 6, 7 of Art. 36. Legal effect of civil death.

Art. 108. Legal presumptions of death from absence.

Arts. 115 to 127. Qualities and conditions necessary for contracting marriage.

Arts. 135 to 156. Opposition to marriage on grounds of nullity.

Arts. 185, 206. Dissolution of marriage. Separation from bed and board.

Art. 367. Corporations not to carry on business unless authorized to do so.

Art. 369, Par. 2. How only corporations can be dissolved.

Arts. 400, 402, 403. Public roads, gates and walls of fortifications.

Art. 803. Gifts by insolvents.

Art. 1569. Sale of registered ships. 1573. Sale of notes, checks, etc.

Arts. 1678, 1679, 1681, 1682. Common carriers.

Arts. 1785, 1786. Loans on interest.

Art. 1886. Claims of special partners in bankruptcy cases.

Art. 1989 Privileged claims of Crown. 1998. 1999. Do. of vendors.

Art. 2007. Claims on ships and cargoes and freight.

Art. 2022. What moveables are susceptible of hypothecation.

Art. 2032. Legal hypothec of the Crown.

Art. 2090. Hypothecs created within thirty days before bankruptcy.

Art. 2151. Form of consent to discharge of hypothecs by Crown, etc.

Arts. 2211 to 2216. Prescription, and rights not prescriptible.

Arts. 2279 to 2354. Bills, notes and cheques.

Arts. 2355, 2356, 2359, 2361, 2362, 2373, 2374. Merchant shipping.

Arts. 2383 to 2403. Privileges and liens on vessels, cargo and freight.

Arts. 2406 to 2462. Affreightment of ships.

Arts. 2464 to 2467. Passengers in ships.

Arts 2582 to 2558. Contribution by average in case of loss. 2560 to 2567. The same.

Arts. 2594 to 2612. Bottomry and respondentia.

All the Acts and parts of Acts, or of the Code, mentioned in Schedule B will be found in a third volume, prepared by the Commissioners and in the hands of the printer, but not yet ready for distribution.

The articles respecting bills and notes are referred to by the Commissioners in a note on chapter 123, p. 1655. All the articles above mentioned are unquestionably law in the Province of Quebec, and those on bills and notes and shipping are more especially interesting to commercial men, as rights may exist or be affected by them or under them in any

Province. The articles of the code relating to shipping have been largely amended by the Dominion Acts, 36 Vict. chaps. 128, 129. The articles respecting bills and notes are referred to in chap. 123, but none of the articles of the code or of the Acts and parts of Acts in Schedule B have been printed in Volumes I. and II., the insertion of Provincial enactments being confined to such as it was thought right to incorporate in the Revised Acts (and so extend to the whole Dominion) or such as related directly to the subject of any chapter, and could therefore be conveniently printed with it, though distinguished as applying only to one or more named Provinces. But Schedule B is a most important portion of the revision as indicating the Provincial enactments, including those of the Code, on subjects under the exclusive legislative authority of the Dominion Parliament, and therefore demanding the most attentive consideration in any attempt to make the law of Canada uniform on any such subject. The Civil Code, more especially, is deserving of attention as having been framed by a Commission composed of a Chief Justice and Judges, who gave their whole time to the work for several years, with most able secretaries and assistants, and the authorities relied on are stated at the end of each article. The fourth book relates entirely to commercial law, and the authorities cited are from the best English as well as French authors. This book, and indeed the whole Code, is well worth the attention and study of lawyers of the other Provinces of the Dominion, and yet more especially of legislators who wish to make the law uniform throughout Canada, as in commercial cases, at any rate, it ought certainly to be.

Schedule C, appended to Vol. II., contains a list of "Acts and parts of Acts repealed, so far as they constitute indictable offences, from and after a day when the proper Legislature makes provision for the punishment of the offence by fine or imprisonment or by both, under the British North America Act, 1867." This Schedule is founded on sub-section 15 of the 92nd section of the B. N. A. Act.

There are also appended to Vol. II.: "A Table of Acts passed prior to Confederation by the different Provinces now comprised in the Dominion of Canada, and of Acts of the Dominion of Canada, showing how much of each is in force, and how each has been dealt with;" and "A Table of Acts and parts of Acts consolidated, showing whence each section, or part of a section, is consolidated." These two schedules embody a full and detailed account of the work done by the Commissioners, and enable the reader to judge of the care and labour bestowed upon it; and with the tables we have mentioned, and the full and detailed index repeated in each volume, afford every facility for using the work and testing its correctness; and though we have not been able to give to the examination of their work the time which the Joint Committees of the Senate and House of Commons were able to bestow upon it, yet we have given it no slight attention and consideration, and feel safe in saying with that Committee that "it has been well and carefully done." W.

SELECTIONS.

COMPENSATION FOR MISDESCRIPTION IN SALES OF LAND.

Considerable variation is noticeable in the practice of the Courts of Equity in granting compensation to a purchaser for a misdescription innocently made by the vendor in a contract of sale of real property. This has been caused partly by the fluctuation of feeling as to the propriety of substituting new contracts for the contracts made by the parties, partly by the fact that the courts, in following prior decisions, have not always distinguished between cases in which the vendor sought to have the contract enforced with compensation for the misdescription, and cases in which the purchaser was the party desiring to have compensation granted, and partly also from the variety of opinion necessarily to be found on the Bench when such questions are asked as, "Does the misdescription relate to an essential matter?" and, "Can compensation be fairly assessed?"

An examination of the cases will, however, the writer ventures to think, show that the following rules are usually observed by the court in granting compensation.

First, in the absence of any previous agreement between the parties:

1. The court will, at the desire of the purchaser, rescind the contract if there has been an essential misdescription, although the vendor would prefer to complete giving compensation.

2. The court will, at the desire of the vendor, decree partial performance with compensation, if the misdescription was non-essential [and if compensation can be fairly assessed], although the purchaser would prefer to abandon the contract.

3. The court will, at the desire of the purchaser, decree partial performance with compensation, although the misdescription was one which would usually be regarded as essential, and even though the vendor would prefer to abandon the contract, provided that the misdescription was contained in the written contract, and that compensation can be fairly assessed. If the misdescription was not contained in the written contract, the purchaser's only remedy is rescission. If the misdescription was contained in the written contract, but compensation cannot be assessed, the purchaser may [at his option] rescind [or accept an indemnity (?)].

Strictly speaking, the words, "abatement of purchase-money," should be used instead of "compensation;" but the ordinary phraseology may be retained, as there is no ambiguity in it.

The words "essential" and "non-essential" in the above rules need definition:

An "essential misdescription" is one whereby the purchaser was induced to purchase something which, but for such misdescription, he would never have purchased at all.

A "non-essential misdescription" is one the only effect of which was to induce the purchaser to give a higher price than he would otherwise have given.

The words "essential" and "non-essential" represent the expressions "very material," "substantial," "substantially and materially different," "very exaggerated description," and "small," "trifling," "infinitesimal," "slight variation," "minor and subsidiary," which are to be found in the cases. In a former number of this Review* Mr. Bigelow suggests that where mistake has been made with reference to an agreed term of a contract, the question of the materiality of the term ought to be excluded; "the parties," he continues, "by making it a subject of agreement have made it material, and the courts have no right to put a different construction upon it." The term mistake as used in the article quoted would include misdescription arising from mistake on the vendor's part. Tested by Mr. Bigelow's suggested principle, all misdescriptions contained in the written contract even though innocently made would seem to be material. Whether the suggested principle is applicable to ordinary mercantile contracts, or not, it certainly is inapplicable to contracts for the sale of land, especially the usual contract entered into upon a sale by auction, and consisting of particulars and conditions of sale and a memoran-

* July, 1885, at p. 299.

dum. In such a contract many clauses are obviously ancillary, and therefore rightly treated by the courts as non-essential; thus, for instance, conditions as to time are considered as not "of the essence of the contract" unless it is so stipulated, or to be inferred from the circumstances. Further, a vendor in describing real estate is so exposed to error, on the ground of wrong measurement, or of defect of title unknown to or forgotten by him, that it would be manifestly unfair to rescind the contract for some slight mistake which could, perhaps, only have been avoided by an expense disproportionate to the value of the property sold; and the "want of mutuality," an evil which cannot always be avoided in the rescission or enforcement of contracts, would appear more glaring if the purchaser were allowed to rescind or complete at his option, whenever the vendor had made an unimportant error in describing the property.

The essentiality of a misdescription is not determined in the abstract, but the court has regard to the purchaser's desire at the date of the contract, e.g., his intention to use the land in a particular way and to his position, e.g. as the owner of adjacent land. Thus, in one case*, the court took into consideration the fact that the purchaser was a timber-merchant and had bought the estate for the sake of the timber trees. The cases illustrating what are and what are not "essential" misdescriptions are very numerous; but without entering into much detail they may be classified as misdescriptions affecting (1) the identity of the property; (2) the tenure, quantum of vendor's estate, or nature of vendor's interest; (3) the size; (4) the situation and physical conditions; (5) the incumbrances, contingencies and liabilities affecting the property; (6) the rent or profits produced by it.

(1) Misdescriptions affecting the identity of the property are essential; thus, where a house numbered 2 was described as "No. 4," the contract was rescinded, although No. 2 was the same sort of house as No. 4, and in better repair. (2) Misdescriptions affecting the tenure, etc. Such misdescriptions are, as a rule, essential; e.g., describing leasehold or copyhold as "freehold," or an underlease as a "lease," or a reversion or a life estate as "fee simple;" but describing freehold as "copyhold," is probably non-essential*, and a slight error in the length of the term in describing leasehold property, e.g., a 97 years' lease described as 99 years, is not essential. (3) Misdescriptions affecting the size of the property will be treated as essential if the deficiency is large in proportion to the whole acreage, or if the part which is wanting is necessary to the enjoyment of the residue, or possesses some special value in the purchaser's eyes, or would, if possessed by another, be liable to affect the purchaser's enjoyment of the residue. (4) Misdescriptions affecting the situation, etc. of the property. In some of the earlier cases misdescriptions as to the situation of the property were treated as non-essential which would now be regarded as essential; thus, where an estate in Kent was described as being situate in Essex, the contract was enforced, although the purchaser declared that his object in purchasing was to become a freeholder of Essex†. Such misdescriptions seem, in fact, hardly distinguishable from misdescriptions as to identity; see No. (1). Misdescription as to the state of repair is not essential, except in the case of a house wanted by the purchaser for immediate occupation. Ornamental timber is an essential matter in the purchase of a residential estate; ordinary timber is non-essential, unless the purchaser is a timber-merchant buying for the express purpose of cutting the timber. The absence of houses, water supply, or frontage, described as belonging to the property, is essential. (5) Incumbrances, etc. The absence of title to tithes where an estate is sold tithe-free is usually essential; but the existence of small rent-charges not mentioned by the vendor is not essential. Rights of mining and common, restrictive covenants, rights of sporting, and, in the case of land sold as building land, rights of way are essen-

* *Lord Brooke* v. *Rounthwaite*, 5 Hare, 298.

* See *Twining* v. *Morrice*, 2 Bro. C. C. 326; secus. *Ayles* v. *Cox*, 16 Beav. 23, where, however, Lord Romilly's statement, "it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another," seems incorrect, as the cases show, that unless the error is obviously essential the purchaser must explain why it is essential to him.

† *Shirley* v. *Davis*, cited with disapproval in *Drewe* v. *Hanson*, 6 Ves. 678.

tial defects. (6) Misdescriptions affecting the rent or profits would seem to be non-essential. Lastly, where the misdescription or defect in title affects not the whole estate but only a portion, the essentiality of the misdescription or defect depends on two questions: first, Is the defect an essential one as regards that portion? secondly, If so, is that portion essential as regards the whole property?

The phrase occurring in Rules 2 and 3, "if compensation can be fairly assessed," requires some explanation. In Rule 2 the words are put in brackets as practically unnecessary, because if a misdescription is non-essential it is from the nature of the case capable of pecuniary compensation. In Rule 3 the words are inserted with some doubt, because the courts have assessed compensation in some cases where it would seem that no pecuniary compensation could be fairly given; thus the absence of any title to work the minerals has been the subject of compensation (see below). It must be observed that the proviso is not "if compensation can be assessed," but "if compensation can be fairly assessed." It is, of course, always possible to assess compensation, just as it is always possible to measure damages for injuries to the body, the feelings, or the reputation. But in assessing damages for a tort it is not considered necessary nicely to weigh the damage in the interest of the aggressor, justice being satisfied if the damages given to the person injured are sufficient, and not caring if they may happen to be too much. In computing compensation for a misdescription however, the rough calculations of a jury are unsuitable: the interests of the vendor have to be considered as well as those of the purchaser, and if the compensation does not admit of a pecuniary valuation which shall be as fair to the vendor as it is to the purchaser, the court will probably refuse to make a rough estimate or an educated guess. The mere difficulty of assessment, where a fair assessment is possible, will not, however, deter the court. In one or two cases, where the possibility of assessment was doubtful, the court directed an enquiry whether compensation could be assessed. Sometimes the surrounding circumstances offer a clue to the amount of compensation due to the purchaser. In one case, the sale of a colliery*, where the annual profits had been overstated, the purchase-money was taken as the basis for calculating the capitalized value of the deficiency in the profits, because the purchaser had, by offering such sum, shown how he himself capitalized the annual profits as stated by the vendors. So, too, upon the sale of tithes†, which the vendor had omitted to describe as subject to an annual fee-farm rent, the court assessed the compensation at 29 years' purchase of the fee-farm rent, because this was the number of years at which the purchaser had himself capitalized the tithes; and similarly, in an action‡ to rescind the sale of a contingent reversion, on the ground of the inadequacy of the price, the fact that the purchaser had offerred one sum under the belief that the reversion was absolute, and on hearing that it was contingent had reduced his offer by one half, enabled the court to fix the value of the contingent reversion as half the value which such reversion would have borne if it had been absolute.

A deficiency in the vendor's interest, which depends for its extent on the duration of a life, admits of actuarial computation and will therefore be assessed by the court. Nor does the chance that the duration of the life may be so different from the actuary's estimate as to give the purchaser both the estate and the compensation make this method of assessment unfair; because the purchaser is equally exposed to the chance of the compensation being, in the event, too small, and the court will "throw the chances together§." In this way compensation has been given where the vendor had only a life estate instead of the fee, or had only a remainder expectant on the determination of a life estate, or had only an estate *pur autre vie;* similarly too, upon a contract to grant a lease for years, where the lessor turned out to have only a life estate.

Where the thing to be compensated for is the absence of title to the minerals, the question "Can compensation be fairly assessed?" is more difficult to answer. The authorities are conflicting. Compensation

* *Powell* v. *Elliott*, L. R. 10 Ch. 424.

† *Hornblow* v. *Shirley*, 13 Ves. 84.

‡ *Baker* v. *Brent*, 1 Russ. & M. 424.

§ Lord Eldon in *Milligan* v. *Cooke*, 16 Ves. 1.

was assessed in *Seaman* v. *Vawdrey*, 16 Ves. 390 (which, however, was a suit by the vendor for specific performance), *Ramsden* v. *Hirst*, 4 Jur. n. s. 200, and *English* v. *Murray*, 49 L. T. 35 (where purchaser wished to rescind, the vendor pressing for specific performance with an abatement); but was considered not to admit of calculation in *Smithson* v. *Powell*, 20 L. T. 105, and *Re Bunbury's estate*, 1 Ir. R. Eq. 458. The method of assessment followed in *Ramsden* v. *Hirst**, viz. to deduct from the purchase-money the value of the minerals to be ascertained by an expert appointed by the judge, seems to be unfair to the vendor, as introducing too much uncertainty, since it was not even known whether there were any minerals at all. A fairer method, at all events in an agricultural neighbourhood, would be to estimate the value of the land as agricultural land, and if necessary reduce the purchase-money to such estimated value. In the case of a house in a residential neighbourhood, it seems impossible to say how much less the property is worth on account of the absence of title to the minerals, since the enjoyment of the property being unimpaired by the defect, the difference in value could only arise from the diminished saleableness of the house, which is too uncertain to admit of computation.

Upon the whole it seems the better opinion that where compensation cannot fairly be assessed the court will not grant compensation. But some of the cases undoubtedly go far to show that a way out of the difficulty can always be found; see (in addition to the cases referred to above, of compensation for the absence of title to minerals) the case of *Peacock* v. *Penson*, 11 Beav. 355, where compensation was assessed* for the damage sustained by the purchaser, in consequence of the vendor's inability to construct a road, which, by the conditions of sale, he had undertaken to make.

The proviso in rule 3 as to the misdescription being contained in the written contract is inserted on account of the law relating to parol variations of written contracts. A purchaser asking for partial performance with compensation for a parol misdescription will not be aided by the courts, because this would be enforcing a contract, one of the terms of which has not been reduced to writing. It would perhaps be unnecessary to make this insertion if reliance could be placed on the definition which is sometimes† given of "misdescription," distinguishing it as something which necessarily occurs in the written contract, the word "misrepresentation" being reserved for misstatements made *dehors* the contract. But this is an arbitary distinction, as a description may be made by parol, and a representation may be contained in the written contract. The distinction really aimed at in *Behn* v. *Burgess*, is that made above between essential and non-essential misdescriptions.

The words in brackets at the end of rule 3 are open to serious doubt; probably on the whole they should be omitted. In *Balmanno* v. *Lumley*‡ Lord Eldon expresses the opinion that the court can neither force the purchaser to accept, nor the vendor to give, an indemnity. It is probably correct to say that a purchaser cannot be forced to accept an indemnity, on the broad ground that the purchaser is entitled to rescind if the misdescription is essential, and no indemnity will be necessary if the misdescription is non-essential, and therefore capable of pecuniary valuation; though in *Wood* v. *Bernal*, 19 Ves. 220, Lord Eldon himself thought the purchaser might be compelled to take an indemnity for a small incumbrance upon a considerable estate. But a vendor has in many instances been held bound to give an indemnity. This has been ef-

* See the report of that case in 4 Jur. n. s. 200; the decree, however, merely declares that the purchaser "is entitled to compensation out of his purchase-money" (it was a sale by the court) "in respect both of an outstanding right under the agreement of 22nd Nov. 1823, to enter the land and sink shafts and work the mines, and also of the purchaser being precluded from working the coal (if any) under the said land himself," 1857 B. 1259. A subsequent order shows that £195 was paid to the purchaser for compensation, the amount of the purchase-money being £2,241; 1857 B. 1354. I have been unable to find the decree in *Seaman* v. *Vawdrey* either in the index or in the Records themselves.

* However, the decree itself contains no order or direction as to compensation, 1848 B. 257.

† Cf. *Behn* v. *Burgess*, 3 B. & S. 751.

‡ 1 Ves. & B. 224 followed in *Aylett* v. *Ashton*, 1 My. & Cr. 105.

fected either by the vendor's executing a security, or by his paying into court a sufficient portion of the purchase-money to abide the event. In *Milligan* v. *Cooke*, 16 Ves. 1, the court ordered an enquiry, what was the difference in value of the interest proposed for sale and the interest the vendor had, and if the Master should find that he was unable to ascertain such difference in value, "the Master should settle such security by way of indemnity as it should appear just that the vendor should execute." In *Wilson* v. *Williams*, 3 Jur. n. s. 810, where the vendor had omitted to state that his wife would be dowable out of the property, and she refused to concur, it was directed that so much of the purchase-money should be retained in court, the annual interest whereon would equal the annual profits receivable by the wife as her dower, the vendor to receive the interest during the joint lives of himself and his wife, the interest to be paid to her during her life if she survived him, and the principal upon her decease to go to the vendor. But it may be doubted whether compensation could not have been assessed in that case; an actuary could have calculated the chance of the wife having dower, and the probable duration of such dower. And to compel a vendor to pay money into court to abide the event for the purpose of protecting the purchaser against a contingency, might be an even greater hardship to him than to order him to pay a lesser sum out and out by way of compensation.

Secondly, where there has been a condition of stipulation in reference to compensation.

The condition may be either that compensation shall, or that it shall not, be allowed.

A condition allowing compensation seems to have no effect on the mutual rights of vendor and purchaser, except in the three cases mentioned below. The rules given above, as to the granting of compensation in the absence of any previous agreement, will therefore be applicable even where there is an agreement that compensation shall be given; e.g. the court will rescind the contract, notwithstanding the condition, if there has been an essential misdescription and the purchaser wishes to have the contract rescinded.

The three exceptions above referred to are the following:

(1) A condition allowing compensation to the purchaser will be enforced even where the error has not been discovered until after completion, unless the condition is especially limited to error discovered before completion. This, notwithstanding some conflicting decisions, may be taken as having been settled by the case of *Bos* v. *Helsham*, L. R. 2 Ex. 72. *Re Turner and Skelton*, 13 Ch. D. 130, and *Palmer* v. *Johnson*, 12 Q. B. D. 32, 13 Q. B. D. 351. The condition, however, does not apply, after completion, in the case of a defect in the title, where the vendor has not made any misstatement. Thus in *Exp. Riches*, 27 Sol. J. 313, where the vendor had only a life estate in part of the property, but sold as absolute owner, the Court of Appeal held that a condition for compensation in case any "error, misstatement or omission" should occur did not apply, as this was a mere defect in title. And where the condition for compensation is only in respect of any "deficiency in the quantity or acreage," the purchaser would probably not be able after completion to obtain compensation for any other error, e.g. a misstatement of the rental. If the condition embraces in terms only "errors and misstatements," or "misdescriptions," a question might arise whether a mere omission would be within the condition. The actual decision in *Manson* v. *Thacker*, 7 Ch. D. 620, might perhaps be upheld on the ground that the non-mention of the hidden culvert was an "omission," and not an "error" or "misstatement," and that the condition did not expressly include "omissions."

(2) Where there is the usual condition for rescission, the right of the vendor to enforce that condition may be affected by the fact that the contract contains a condition for compensation. In the absence of any condition as to compensation the purchaser's demand for compensation would, like any other requisition, enable the vendor to rescind under the condition for rescission. If there is a condition for compensation, and an error covered by that condition is admitted or clearly proved by the purchaser, the vendor will have to give compensation, and cannot rescind on the ground of unwillingness to comply with the purchaser's requisition.

(3) The third exception to the general rule is one which in the opinion of the writer has no good foundation, but it is inserted here in deference to the authorities mentioned below. It is this, that where the defect is known to the purchaser at the date of the contract, or is one which the purchaser is by the conditions precluded from objecting to, the condition for compensation will nevertheless enable him to obtain compensation. The authorities for this very disputable proposition are the opinions of Mr. Justice Kay in *Lett* v. *Randall*, 49 L. T. 71, and of Vice-Chancellor Bacon in *English* v. *Murray*, 49 L. T. 35. In the former case the vendors had described the property as let on lease for 75 years from 1850, the fact being that the term commenced in 1858. Mr. Justice Kay thought that the purchaser did not actually know the description was wrong, but that even if he did, the vendors were bound to give compensation because they had contracted to give it. The argument that the purchaser had paid a higher price owing to the misdescription, because even if the purchaser knew of the mistake the other bidders did not, and being influenced by the description bid higher than they would otherwise have done, does not seem conclusive. Either the purchaser was content to give the price he offered, in which case he wanted no compensation, because he had suffered no damage; or he paid more in the expectation of obtaining compensation, in which case he committed a fraud on the vendors. In the case *Camberwell and South London Building Society* v. *Holloway*, 13 Ch. D. 754 (see p. 762), the late Master of the Rolls held that a purchaser who had notice that property described as a lease was only an underlease, was not entitled to compensation under a condition allowing compensation "if any error or mistake shall appear in the description, or in the nature or quality of the vendors' interest therein." And though the word "lease" was only ambiguous and therefore no actual misdescription had occurred, the principle of the case is certainly at variance with the opinion of Mr. Justice Kay in *Lett* v. *Randall*. The second part of the proposition above set out is even more doubtful, but is founded on *English* v. *Murray*, where a condition which was held to be sufficient to preclude the purchasers from rescinding on the ground of a defect in the vendors' title, was in the Vice-Chancellor's opinion not sufficient to preclude them from demanding compensation under the condition for compensation. But it is to be observed that the vendors there, both before the action and at the hearing, conceded the purchasers' right to compensation, the only point for the Vice-Chancellor's decision being whether the purchasers were entitled to rescind.

The condition that no compensation shall be allowed to the purchaser, though sufficient to prevent a purchaser from insisting on completion with an abatement of the purchase-money, is not sufficient to enable the vendor to enforce specific performance where there has been an essential misdescription. It has been said (by Malins, V.-C., in *Whittemore* v. *Whittemore*, 8 Eq. 603), "conditions of this kind must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements." But it is not, properly speaking, a question of construction; it is rather a principle of equity that, notwithstanding the conditions of sale or the agreement, the vendor shall not have specific performance if he have materially misled the purchaser (*Re Terry & White*, 32 Ch. D. 14; see judgments of Lord Esher, M.R., and Cotton, L.J.). And not only is specific performance refused to the vendor in such cases, but the purchaser can obtain a decree for rescission of the contract.—*Law Quarterly Review.*

REPORTS.

COUNTY COURT OF LINCOLN.

PURCELL ET AL. v. GREAT NORTH-WESTERN TELEGRAPH COMPANY.

Telegraph company—Repeating message—Misrepresentation—Gross negligence.

The plaintiffs received at St. Catharines on defendant's line, a message from Aylmer, in which they suspected there was an error (as in fact there was, the word "Five" having been substituted for "Two" by the operator at Aylmer), and requested the defendant's manager at St. Catharines to have the message repeated. He telegraphed the Aylmer office to repeat the message, and it was repeated with the same mistake as before. Defendants made no charge for repeating the message.

The plaintiffs having acted upon the message, and sustained loss thereby,

Held, that the defendants were not liable to the plaintiffs for the mistake.

[St. Catharines.

This action was brought to recover damages sustained by the plaintiffs in consequence of the negligence of the defendants in the transmission of a telegraphic message over their line, sent by the Aylmer Canning Co. to the plaintiffs, and which was subsequently repeated at the instance of the plaintiffs, the word "five" being erroneously used in the message as delivered (both in the original and the repeated message), instead of "two" as the word was on the message handed in for transmission to defendants' office at Aylmer.

The question arose as to whether an action could be brought by the receiver of a message to recover damages for negligence in its transmission, and it was held by the learned judge, in accordance with the English and Ontario authorities, that it could not.

The plaintiffs also contended that they entered into a contract with the defendants to have the message repeated, and that there was negligence again on the part of the defendants in the repeating of the message, and that they were entitled to recover for the loss sustained by them in consequence of this negligence.

SENKLER, Co.J.—There is no doubt that the plaintiffs' manager asked the defendants to have the message repeated, and that the defendants agreed to do this, and did have it repeated, and I should have no hesitation in finding that the defendants' operator at Aylmer was guilty of negligence in sending the message again with the third word "five" instead of "two."

The question remains to be decided whether the repetition was done under a contract or as a gratuitous act, and if the latter whether any liability attaches to the defendants in respect of any negligence on their part in performing it.

The plaintiffs' agent swears positively that when he asked to have the message repeated he told Dudley to charge to them, and Dudley replied "all right." Dudley is equally positive that nothing of the kind was said. As the conversation took place over a telephone, the words may have been used by Fenton, and not heard by Dudley. Fenton intimated in his evidence that the item had been charged, and subsequently abandoned when the mistake was discovered. He was unable, however, to produce any proof of this assertion, which was positively denied by Dudley. While I do not doubt Mr. Fenton's good faith in alleging that he used the words "charge to us," I do not see how I can, in the face of Dudley's denial, hold that they came to his ears, unless there is something in the surrounding circumstances to make his statement the more probable, and I must say I do not see anything. Then assuming that Fenton simply told Dudley to have the message repeated, and Dudley answered that he would, is that a contract? That would depend upon whether it was to be paid for. Ordinarily when a person who is engaged in any business or calling is told to do something in that business or calling, the presumption will be that he is to be paid for it, and if he does what he is told to do, he can collect its value. It is urged on behalf of the plaintiffs that the term "to repeat a message" is well understood in the business of telegraphing, and that it is regularly charged and paid for, and that the order to repeat the message must be understood in this way.

To this it is answered that in one sense to repeat a message is a well understood term, but not in a sense that applies to the message in question. That any person about to send a message can, if he chooses to pay a further sum equal to half the price charged for the message itself being forwarded, have the message repeated back from the office to which it is sent, and in this way he can be certain that the message is received in the office to which it is sent in the same words as he has sent it. That this mode of repetition does not apply to parties receiving messages, that so far as they are concerned there is no recognized system of having messages repeated, but, that as a matter of fact, when a person does not understand a message he has received, it is the custom for the receiving office to ask the transmitting office to repeat or

duplicate the message, and that this is done without charge and as a matter of favour; and it is sworn that it was so done in the present case, and that no charge was ever made or intended to be made for the repeating the message.

Mr. Fenton does not say that he ever paid for having a message repeated in this way, nor does he show that any other person ever did so, or bring any evidence to contradict Mr. Dudley's evidence as to the custom of the defendants in this particular, and I am of opinion on the evidence that the company in having the message repeated did so gratuitously and without consideration.

Then what responsibility does the law impose upon the defendants, in respect of this gratuitous act? I have been unable to find any express decision on the point. In England the management of telegraphs is now under the control of the Government, and consequently no such point could arise there, and during the period in which telegraphs were managed by private companies, I cannot find any case in which the case came up, nor can I find any in our own reports. In the United States the question would not arise, because there the defendant would be held liable in respect of negligence in transmitting the original message—See Gray on "Communication by Telegraph" pages, 115, 116, and cases there cited. The American law differs widely from the English in this particular. The English cases I have previously referred to deny there being any analogy between the consignment of goods through a carrier, and the transmission of a telegram—See *per* COCKBURN, C.J. in *Playford* v. *U. K. Tel. Co.*, L. R. 4 Q. B. at page 714, and *per* BRAMWELL, L.J. in *Dickson* v *Reuter's Telegram Co.*, 3 C. P. D. at page 7.

Upon principle I do not see how the liability of the defendants can at most be placed higher than that of an ordinary mandatory without reward, viz.: "That they would only be liable for gross negligence." I cannot see how the question of skill comes in; there is no question as to the skill of defendants' employees in working the telegraph; what is complained of is the carelessness of the operator in reading the message.

According to the dictum of MARTIN, B. in *Mills* v. *Holton*, 2 H. & N. at page 18, the defendants, by merely doing an act of kindness, would not incur any responsibility. But assuming that they would be liable for gross negligence, is that proved?

In those cases in which a person is liable for gross negligence, he is bound to exercise something less than ordinary care. This statement of law is easier made than applied to the circumstances of any particular case. It is probable that the word in respect of which the difficulty has arisen in this case, was so written that at a first glance it might be taken for either "two" or "five." Judging from its appearance in Ex. 3 (a copy made by Nairn in the telegraph office at Aylmer on the morning of the 29th September), I should say that it was so; still on examination it would, at least, be doubtful if it was "five" under these circumstances, I should consider it the duty of a person bound to exercise ordinary care, to make inquiries, but I find a difficulty in saying that a person would be guilty of gross negligence if he did not do so. I am of opinion, therefore, that the plaintiffs have not shown that the defendants were guilty of gross negligence. I have considered the question of defendants' liability, on the supposition that they would be liable for gross negligence. This liability for gross negligence is generally found in cases where there has been a gratuitous bailment of goods, or a gratuitous service done for a person, and through the negligence of the bailee or person doing the service some physical injury has been suffered by the goods or person. The bailee has possession or charge of the goods or person, and, while this is the case, they are injured by his negligence. In the present case these facts do not exist, and I doubt very much whether the principle I have referred to applies to it. It seems to me that this is more like a case of misrepresentation, and no action will lie for misrepresentation of facts, simply because made carelessly—it must be fraudulent—(*per* BRAMWELL, L.J. in *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D., at page 6).

I am of the opinion that the action must be dismissed with costs.

DIVISION COURT.

BOYLE ET AL. V. GRAND TRUNK RY. CO.

Snow fence—Damages arising therefrom—Limitation of right of action.

In an action against a railway company for damages occasioned by a large accumulation of snow upon the plaintiffs' lands, caused by the defendants' snow fence, whereby, on the melting thereof in spring, it became unworkable, and the crop sown thereon deficient.

Held, that the damages were continuous during the whole growth of the crop, and that, therefore, the statutory six months within which to commence the action is to be counted from the date of harvesting.

[Whitby, February, 1886.

The plaintiffs proved damages to the extent of at least $40. After the removal of the snow fence, in the spring of 1886, a large body of snow, which had accumulated upon the plaintiffs' land by the action of the defendants' snow fence, remained thereon for some weeks, melting gradually, and rendering a considerable portion of a twenty acre field wet, sour and difficult to work. The grain

put in on the land injuriously affected only partly germinated, and by reason of the baking of the soil did not yield anything like the rest of the field. The crop was harvested during the last few days of August, and the plaintiff commenced his action in the middle of December, 1886.

DARTNELL, J.J.—The defendants contend that the statutory period of six months within which an action may be brought has expired, and that therefore the plaintiffs are out of court. This is a question of some interest, and calls for determination.

Sec. 46 of the Railway Act permits railway companies, on and after the 1st November in each year, to enter upon lands adjacent to the line of railway, and erect and maintain snow fences, subject to the payment of such land damages as are thereafter established. Such fences are to be removed before 1st April in the following year. In the case in question the fence was not removed until the middle of April, but no complaint is made on this score.

Sec. 27 of the same Act provides that all actions or suits for any damages or injury sustained by reason of the railway "shall be commenced within six months next after the time when such supposed damage is sustained, or, *if there is a continuation of damage*, within six months next after the doing or committing of such damage ceases, and not afterwards"; and the defendants rely upon this as a defence to the plaintiffs' claim.

It is quite clear that the six months did not commence to run from the date of erecting the fence, nor from the date of its removal; for at these dates, and for the intermediate period, no actual damage was occasioned.

The erection of the fence occasioned the collection and retention of a large amount of snow on the plaintiffs' land which theretofore had been free from it. This mass of snow remained long after the rest of the land was workable and fit for crop, retarding the early sowing of the seed (barley) and injuring it during its growth. I think the damage was continuous during the whole growth of the grain; which, from the state of the land, caused by the unwonted accumulation of snow, and the gradual melting thereof, caused appreciable damages to the plaintiffs' land and crop.

It seems to me that such damages cannot be said to have "ceased" until the cutting of the grain; and as the action was brought within six months of that date, that the defendants must fail in their contention, and the plaintiffs recover the amount of the damages they have clearly proved.

N. F. Paterson, Q.C., for plaintiffs.

The defendants were not represented.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Boyd, C.] [April 6.

MCINTOSH V. ROGERS.

Conditions of sale—No deeds to be produced other than those in vendor's possession—Sale of land.

By written agreement for the purchase of land it was provided "no title deeds, abstracts or evidences of title to be required other than those in vendor's possession, nor shall the vendor be required to give a covenant for the production of the same."

Held, that under this condition the vendor was relieved from the absolute obligation of making out the title to be good; while if the evidence of title coupled with the abstract, and it may be the public register did not disclose and prove a good title, the purchaser was not bound to complete.

W. W. Fizgerald, for the vendor.

G. W. Marsh, for the purchaser.

Robertson, J.] [April 29.

RE WATSON.

Will—Restraint on alienation—Invalidity.

By his will P. T. devised lands as follows: "That T. T. do inherit the same as his property, on the conditions that he never will or shall make away with it by any means, but keep it for his heirs."

Held, the condition attached to the devise was invalid, being an absolute and unqualified restraint on alienation.

Smith v. *Faught*, 45 U. C. R. 484, and *In re Winstanley*, 6 O. R. 315, distinguished.

G. H. Smith, for the purchaser.

A. H. Marsh, for the vendor.

PRACTICE.

Rose, J.] [Sept. 3, 1884.

REGINA v. RILEY.

Magistrate — City and county — Jurisdiction — R. S. O. c. 72, s. 6.

R. S. O. c. 72, s. 6, does not limit the territorial jurisdiction of county magistrates, but prohibits them from acting "in any case for any town or city"; the limitation is as to the cases, not as to place, and is only partial, *i.e.*, for a city where there is a police magistrate, and then only when not requested by such police magistrate to act, or when he is not absent through illness or otherwise; and therefore in any case arising in a county, outside of a city, a county justice having jurisdiction to adjudicate while sitting in the county, may adjudicate while sitting in the city.

Owing to changes in the statute law, the decisions in *Regina* v. *Row*, 14 C. P. 307, and *Hunt* v. *McArthur*, 24 U. C. R. 254, are no longer applicable.

J. G. Scott, Q.C., for the Crown.

V. MacKenzie, Q.C., for the prisoner.

Court of Appeal.] [May 11.

LANGDON v. ROBERTSON.

Leave to appeal—Time.

Where leave of the Court is necessary for an appeal, application therefor should be made within three months from the judgment to be appealed from; but in a case where, although leave to appeal was necessary, none was obtained, and the appellant gave notice and filed his appeal bond, which was allowed without objection by the respondent,

Held, that such an equity was raised in the appellant's favour by the respondent's not objecting to the allowance of the security, as entitled him to relief after the three months. The rule laid down in *Sievewright* v. *Leys*, 9 P. R. 200, is the rule that should be acted upon in regard to extension of time.

Upon an interlocutory application the Court will not hear more than one counsel for any party.

J. L. Murphy, for the appellant.

Mackelcan, Q.C., for the respondent.

C. P. Div. Ct.] [May 18.

WAGHORN v. HAWKINS.

Order made at trial, how signed—Divisions of High Court.

Where an action in the Queen's Bench or Common Pleas Division of the High Court of Justice is, under Rule 590, set down for trial at a sittings for trial of actions in the Chancery Division, any order made in such action by the Judge presiding at such sittings should be signed by the officer who acts as Registrar at such sittings, and not by the Registrar of the Division to which the action belongs.

J. M. Clark, for the plaintiff.

Q. B. Div. Ct.] [May 19.

REGINA v. HALL.

Canada Temperance Act—Conviction—Adjournment to consider of judgment—32 & 33 Vict c. 31, s. 46—Evidence—Certiorari.

The decision of BOYD, C., *ante* p. 193, was affirmed on appeal.

Walter Read, for the appeal.

Aylesworth, contra.

FLOTSAM AND JETSAM.

THE London *Law Times*, referring to the second reading in the House of Lords of Lord Bramwell's bill to enable prisoners, and the husbands and wives of prisoners, to give evidence on their trial, says:—"We wish the measure all success, for although it will no doubt work unfavourably to criminals as a class, we feel convinced that it will be a boon to innocent persons, and aid materially in unravelling mysteries in which innocent persons are charged with crime. The fifth clause of the bill, to which Lord Esher objects, provides that a prisoner shall not be cross-examined as to any previous convictions. But we fail to appreciate Lord Esher's objection. Evidence from the dock under any circumstances would always be received by a jury with reserve, but the admission by a prisoner of a previous conviction would in nine cases out of ten ruin his chance of acquittal, and completely defeat the object of the act. A prisoner, although innocent of the immediate crime charged against him, would hesitate to give evidence, however important his evidence to his case might be, if he knew that he ran the risk of having to admit a previous conviction."—*Ex.*

IT is a beautiful story that in one of the old cities of Italy the king caused a bell to be hung in a tower in one of the public squares, and called it "The bell of justice," and commanded that any one who had been wronged should go and ring the bell, and so call the magistrate of the city, and ask and receive justice. And when in the course of time the lower end of the bell rope rotted away, a wild vine was tied to it to lengthen it; and one day an old and starving horse that had been abandoned by its owner and turned out to die, wandered into the tower, and in trying to eat the vine, rang the bell. And the magistrate of the city, coming to see who rang the bell, found this old and starving horse; and he caused the owner of that horse, in whose service he had toiled and been worn out, to be summoned before him, and decreed that as his poor horse had rung the bell of justice, he should have justice, and that during the horse's life his owner should provide for him proper food and drink and stable.—*Central Law Journal.*

PROMPT DECISION.—It is not unusual to find certain people judging their neighbours from intuition rather than from evidence. Such brilliant rashness is mischievous enough in private life, but in the court-room it is even more out of place.

Great difficulty was once experienced in collecting a jury, in one of the backwoods settlements of the far West. Eleven jurors had at length been sworn in, and there remained but one man to dispose of. He was a small, lean, lank fellow, with a very shrewd face and uncouth demeanour, and his apparel suggested the fact that he had never before been within sight or sound of civilization.

He was asked the usual questions, whether he had formed any opinions about the case, whether he had any prejudice against the prisoner, or whether he was conscientiously opposed to capital punishment. To all these he returned a decided negative.

Neither the judge nor the lawyers particularly liked the man's manner, but it was late, and jurors were scarce; so he was accepted.

In accordance with an old form, surviving strangely in out-of-the-way places, he was set before the alleged murderer, while the judge said, "Juror, look upon the prisoner; prisoner, look upon the juror."

When this command was given, the little man leaned forward, and for some moments scanned the culprit carefully from head to foot; then he raised his head, and, turning to the judge, said, in a firm and solemn voice, "Yes, judge, I think he's guilty!"—*Central Law Journal.*

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books o the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

Law Society of Upper Canada.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Primary Examination Curriculum for 1887. 1888, 1889 and 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. JUNE 15, 1887. NO. 12.

DIARY FOR JUNE.

15. Wed...Magna Charta signed, 1215.
18. Sat.....C. C. York term ends. Battle of Waterloo, 1815.
19. Sun.....*2nd Sunday after Trinity.*
20. Mon...Accession of Queen Victoria, 1837.
22. Wed...Longest day. Slavery declared contrary to law of England, 1772.
26. Sun.....*3rd Sunday after Trinity.*
28. Tues..Coronation of Queen Victoria, 1838.
30. Thur...Acquittal of the seven bishops, 1688.

TORONTO, JUNE 15, 1887.

"BOYCOTTING," when applied to American citizens, does not appear to meet with any more favour in the courts of the neighbouring Republic than it does in Ireland. The Supreme Court of Errors of Connecticut recently decided in the case of *State* v. *Glidden* (see 15 Am. Law Record 649), that an agreement to "boycott" a firm, as that term is generally used by organizations of workingmen on this continent, and to injure and oppress certain employés who do not join with the boycotters, is a conspiracy at common law. The "boycott" in the case in question was directed against the Carrington Publishing Company; the conspirators were found guilty, and the conviction was unanimously affirmed.

AMONG the ingenious contrivances of the present day for turning an honest penny, it appears an automatic box has been invented, which is so contrived that by dropping into it a penny and pushing a knob, a cigarette will be presented to the depositor of the penny. These boxes it seems are, in England, placed in public places for the convenience of the public and the profit of the proprietor. Some youths, whose desire for cigarettes exceeded their notions of honesty and fair play, recently induced one of these boxes to disgorge some of its contents by dropping in discs of brass, instead of honest pennies. Such a brazen attempt at fooling the box was not suffered to go unwhipped of justice, for on being caught and carried before a magisterial court, the deceivers were found guilty of larceny, and the conviction was affirmed by a court composed of Lord Coleridge, C. J., Pollock, B., and Stephen, Mathew, and Wills, JJ., as may be seen by referring to *Regina* v. *Hands*, 56 L. T. N. S. 370.

AMONG the new comers to our editorial table is the first number of the *Harvard Law Review*, a monthly journal published during the academic year by the Harvard law students. The primary object of this *Review* is to set forth the work done in the Harvard Law School. Though the *Review* is managed by the students, the list of contributors comprises not only the names of six professors of the law school, but also of many other lawyers of distinction. The opening number is graced by an able article by Prof. J. B. Ames on the law affecting the rights of a "purchaser for value without notice." It may not be out of place to point out that the case of *Moyce* v. *Newington*, 4 Q. B. D. 32, to which he refers, was recently overruled by the Court of Appeal in *Vilmont* v. *Bentley*, 18 Q. B. D. 322 (see *ante* p. 142). The law of "tickets" is also ably discussed by Mr. J. H. Beale, jun., one of the editorial board. The proceedings in the Moot Courts are also reported. The *Review* is

admirably printed, and as a specimen of typography is, we believe, unrivalled among its contemporaries on this side the Atlantic. If it continues as it has begun it is deserving of a successful and honourable career.

MONEY IN COURT.

UNDER Rule 606 lately passed, no cheque is to be issued from the Accountant's office prior to the long vacation, unless the præcipe therefor is lodged in the Accountant's office on or prior to the 20th June. The 20th June therefore is the last day before the vacation on which cheques can be præciped. We believe it is not the intention of the Accountant to insist on the orders being left with the præcipes, as owing to the rush of business about that time there may be some delay in getting them drawn up and entered; at the same time the orders will have to be left before the cheques can be drawn up.

ERRATA.

IN the article on "The Revised Statutes of Canada, published in our last issue, the following errata require correction:

Page 202, second line of second paragraph, for "June, 1885," read, "June, 1883."

Page 206, twenty-second line from bottom, for "Revised Statutes for Lower Canada," read, "Statutes of the Province of Canada."

Page 207, second column, fourteenth line, for "whence," read, "where."

A CODE OF PROCEDURE.

A SCHEME of a Code of Civil Procedure has been prepared and distributed under the auspices of a joint committee of the Law Associations of York, Middlesex and Wentworth. This scheme involves the further reorganization of the courts, and many radical changes in practice.

The Attorney-General has very properly pointed out that some of the proposals embodied in this scheme are only within the competence of the Legislature to deal with; and he has recommended that the Associations should confine themselves to suggesting such additions and alterations in the existing rules and practice as may be deemed substantially material, and as may give the judges the minimum of work in considering and adopting them.

The project of the Law Associations, as set forth in the scheme for a code of procedure, is ambitious, and we fear too ambitious to be at present successfully carried out. The manner in which they propose to deal with the matter is no doubt the correct one, but at present it is simply impracticable, and they have, we think wisely, resolved for the present to confine their attention to those matters within the limits suggested by the Attorney-General.

The first point to be aimed at is the more perfect assimilation of the practice in all the Divisions of the High Court. In order to do this the judges themselves require to be more thoroughly imbued than we think they are at present with the idea that they have ceased to be judges of different courts, and are now judges of one and the same court; that there are no longer any "Common Law Courts," or "Court of Chancery;" that the Queen's Bench and Common Pleas Divisions are just as much Courts of Equity as the Chancery Division; and that the Chancery Division is just as much a Court o

Common Law as the two other Divisions; and that neither of them is any more nor any less a Court of Equity or a Court of Common Law than the others.

When the judges are thoroughly indoctrinated with these ideas, and have ceased to talk about the "Court of Chancery," and the "Common Law Courts," then it is possible that the various officers of the court may also learn that they have ceased to be officers of different courts, and have become officers of the same court, in the offices of which the practice ought to be identical; and that it is their duty to facilitate, as much as lies in their power, the unification of procedure in their various offices. So long, however, as men have different ideas, and are resolutely bent on maintaining them, and no autocratic power exists by which harmonious action can be enforced, we despair of seeing perfect uniformity of practice, either on the bench or in the offices of the court. Even the self-same rule will be construed by different minds in different ways. The Law Associations, however, by calling attention to diversities where they exist, and pointing out the practice which they think would be most beneficial for universal adoption, would be doing substantial service.

So far as the diversity of practice is the result of express rules of court the course of the Law Associations is plainer, and something may be accomplished by their submitting drafts of rules which would have the effect of assimilating the practice in all the Divisions in the most convenient way. This, we are glad to notice, the Associations propose to do.

It is also proposed that one judge should sit weekly for the disposal of all chamber and court business in all the Divisions. This, as we pointed out in February last (see *ante* p. 61), would certainly be a saving of judicial strength and time, and we should think would be gladly welcomed by the Bench. The proposal to hold four permanent sittings at fixed dates in each county for the trial of actions is a proposition that may prove more difficult of acceptance. In some of the counties we are inclined to think the holding of four courts annually would be a waste of time, and it would probably be found a wiser plan to group some of the counties and provide for the holding of alternate sittings in the counties composing the group. All the advantages of the proposal of the Associations might in this way be realized without unduly increasing the expense of the administration of justice. Another proposal in the interest of country practitioners is to give the power to local taxing-officers to allow increased counsel fees at trials to the amount of $40 for senior, and $20 for junior counsel.

The Associations also suggest that the proposed consolidation of the rules of practice and procedure, as set forth in the printed draft now under consideration of the judges, should be deferred, so that when ultimately consolidated the rules may supersede all existing rules, and form a complete code of practice. But this suggestion, we fear, will not be at present entertained by the powers that be. The necessity of searching orders in Chancery and rules of the former Common Law Courts, together with the Judicature Rules, in order to ascertain the practice, is no doubt an anomaly; but the compilation of a complete Code of Procedure is a very difficult matter, and one requiring more time, and greater care and attention and practical knowledge of the subject, than a committee of judges have in their power to bestow.

We observe that the Law Society has voted a sum of $2,000 towards the expense of drafting a Code of Procedure. This expenditure seems open to serious objection The Law Society is already so crippled in funds that it has for some time past

been compelled to stop supplying the profession with the Supreme Court reports, and when legitimate expenses are thus cut down, it seems a little strange that the funds of the Society should be applied towards objects which it is the duty of the Government of the Province to provide for, and which are in no sense within the legitimate sphere of the Law Society. Such an expenditure of the funds of the Society, we should think, is clearly *ultra vires*. The profession pay taxes enough to the Government in the shape of law stamps, and we do not see that their governing body should go out of its way to assume a burthen which ought properly to be borne by the Provincial exchequer.

THE PROVINCIAL LEGISLATION OF 1887.

DURING the past session the Legislature added about one hundred new Acts to the Statute Book. About one-half of these are public Acts and the rest are private. These Statutes cost the country, at a moderate computation, about $1,000 a piece; but we very much doubt whether any individual in the community would think that the whole batch is worth anything like the average cost of one of them.

A more senseless waste of public money than is presented year by year in the pages of the Statute Book of Ontario it is difficult to conceive.

Those Acts which are considered of public importance are printed, as usual, in a supplement of the *Ontario Gazette*, and they number, all told, thirty-six—and many even of these have merely a local importance. The first of general interest is styled "An Act for Further Improving the Law," and consists of a dish of scraps, compiled very much on the principle of every member dropping into a bag a section on any subject which happened to come into his mind. We suppose when the Revised Statutes come out at the end of the year this strange chaotic medley will be reduced to order. At present it is a confused jumble of every conceivable subject. It begins by amending the Interpretation Act in some trifling particulars, then it touches up the Election Act, then it provides for the division of the Shrievalty of York in order to make two offices instead of one—a step which the Attorney-General is probably already sorry for. Then we see that some man who wishes further to decrease poor Sheriff McKellar's fees has got in a section to compel Sheriffs to include any number of names in the same certificate. Then we have a delicious little piece of legislative blundering, which, if literally construed, virtually repeals the Petition of Right Act. The section in question amends R.S.O. c. 59, and provides that that Act shall not entitle a subject to proceed by petition of right in any case in which he would not be so entitled under the Acts heretofore passed by the Parliament of the United Kingdom, and inasmuch as in no case did the Acts of the United Kingdom enable a subject to sue by petition of right in Ontario, it follows that the petition of right procedure is virtually abolished, but for the rule laid down by the Privy Council in *Salmon* v. *Duncombe*, 11 App. Cas. 627, which will possibly enable the courts to construe the Act to mean what the Legislature intended, and not what it has said. Another section enables the court to order a sale of lands taken under a writ of attachment before the lapse of twelve months. Then the Act relating to the transfer of real property comes in for attention, and persons having powers are enabled to validly contract not to exercise them. The Act respecting trustees and executors and the administration of estates is amended by the next section. The amendment

enables an insurance company to pay the insurance money payable on a policy on the life of a deceased person to the personal representative appointed by the courts of the Province where the deceased was domiciled, "after the expiration of two months," if no personal representative has been appointed in Ontario. But it does not appear from what time the two months is to count, whether the death of the assured, or the appointment of the representative by the Court of the Province where the deceased was domiciled, and in other respects the section is badly drawn.

The next section amends R.S.O. c. 107, s. 31. This section requires a person having a claim against a deceased person's estate, which is disputed by the personal representative, to bring an action to enforce the claim within six months after notice that the personal representative disputes the claim. The amendment requires the personal representative, in his notice disputing the claim, to refer to the section, and his intention to avail himself of its provisions, and also gives the claimant a further period of one month to bring a new action, in the event of being nonsuited.

Last year, when referring to 49 Vict. c. 16, s. 23, enabling actions for torts committed by deceased persons to be brought against their personal representatives, we pointed out that no limit of time had been prescribed within which such actions should be brought. This defect is now cured by a section which requires the action to be brought within one year after the decease. But suppose no personal representative be appointed within that period, what then?

The Act for facilitating the transmission of timber, R.S.O. c. 153, s. 44, is amended in some trifling particulars; and then the Registry Act is amended by the addition of a clause enabling instruments which have been registered by memorial to be registered in full. This is a useful provision. Persons insuring their lives for the benefit of their wives and children are next enabled to make and alter an apportionment of the insurance money among the beneficiaries. The Assessment Act and Cemetery Act receive amendment; and then the poor little English sparrow is ruthlessly outlawed! Well, if the people of Ontario can stand it, it is probable he can. It would be a useless waste of time to enumerate all the subjects dealt with in this Act "for improving the law." One or two other sections, however, deserve special notice. The Married Woman's Property Act, 1884, is amended first, by a provision that that Act shall not be construed to deprive a woman married prior to its commencement of any right or privilege which she then had, or would thereafter have had if the Act had not been passed, the effect of which, of course, is to revive in favour of women married prior to 25th March, 1884, the prior Statutes which by section 22 of the Act of 1884 were repealed—and is, we think, an unwise provision. The Act of 1884 was based on the English Act of 1882, which contained no such clause. In addition to this amendment a clause is added, enabling married women to enjoy their separate earnings, which seems to be entirely unnecessary, inasmuch as it appears already sufficiently covered by the 3rd and 5th sections of the Act of 1884. The next section validates all conveyances by a married woman since 29th March, 1883, which her husband signed or executed, or shall sign or execute. We observe in the side note to this section it is stated to relate to conveyances made since 29th March, 1873; which of the two dates is the one really intended we do not know. An amendment next section will probably reveal the mystery. A saving clause follows

excepting conveyances made to the prejudice of any title lawfully acquired from any married woman prior to the Act, also conveyances made *mala fide*, and conveyances of land of which the married woman or those claiming under her are in actual possession contrary to the terms of the conveyances; and the rights of litigants in pending actions are also saved.

Section 30 amends 48 Vict. c. 13, s. 23, by providing that in County Court cases, tried by a judge, a motion may be made for a new trial at the quarterly sittings, on any ground except that upon the evidence given, the judgment is wrong in law.

Sections 34 and 35 are evidently intended to be supplementary to the Devolution of Estates Act of 1886. The first provides that letters of administration may be granted to the personal estate alone—which is a power we should have thought the Surrogate Courts could have exercised without the aid of this section, by virtue of the power they possess to grant limited administration. Williams lays it down that there may be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person. But he goes on to say this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given. The section seems to indicate that the Legislature did not feel very sure of its ground. One session it passes an Act virtually making real estate personalty, and the next session it tries to revive the distinction which the previous session it had abolished. This section, we think, is a blunder.

For the purpose of getting over the technical difficulty which arises from the Legislature persisting in preserving the old feudal law of tenure, Section 35 is passed, providing that in the case of any person dying after 1st July, 1886, his personal representative for the time being shall, in the interpretation of any Provincial Statute, or in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his "heirs and assigns," unless a contrary intention appears.

We presume the personal representative here mentioned is the general personal representative, not an administrator whose grant is limited to the personal estate. It is possible, however, it would include an administrator whose grant is limited to the real estate; but this is not certain. The effect of limited administration has evidently not been thought out, and these sections are a specimen of the crude and ill-digested legislation which our Local House annually treats us to.

The concluding clauses of this wonderful conglomerate Act deal with the right of mortgagees under mortgages thereafter executed to distrain for arrears of interest, and limits the right of distress as against creditors of the mortgagor and persons in possession under the mortgagor to one year's arrears. But this restriction is not to apply unless one of the creditors is an execution creditor, or unless an assignee for the general benefit of creditors shall have been appointed before sale, and unless notice is given by the officer executing the writ, or by the assignee to the distrainor before sale of the distress, which is not to be made except after public notice, as is now required to be given by landlords.

The Act which follows is another of the same description as the last, and it is passed to give effect to certain amendments suggested by the Statute Commissioners, the most noticeable features of which are the alteration in the dates of the quarterly sittings of the County Courts, the only change made being in the January sittings, which are hereafter to be held on the second Monday in January instead of the first.

The right to sell under an execution an inchoate right of dower has been taken away. It was formerly held in the much litigated case of *Allen* v. *Edinboro' Life Assurance Co.*, 19 Gr. 248, that such a right was not saleable in execution; then 40 Vict. c. 8 (O.) was passed, and in the same case it was held that the effect of that Statute was to enable such interests to be sold in execution; *Allen* v. *Edinboro' Life Assurance Co.*, 25 Gr. 306; now the *status quo ante* is regained. It seems like a game of battledore and shuttlecock.

By Chapter 9, the law relating to libel actions against newspapers is amended. And by chapter 10 further amendments are made in favour of the exemption of goods from execution. A debtor is now entitled to hold free from execution all his beds, bedsteads and bedding in the ordinary use of himself and family, and all his or their necessary wearing apparel; furniture to the value of $150, fuel and provisions to the amount of $40; live stock to the value of $75; besides food therefor for thirty days; tools and implements to the value of $100; besides 15 bee-hives:—or $365 worth of property in addition to beds, etc., wearing apparel, and bee-hives. The impecunious debtor cannot surely complain of any want of consideration.

Chapter 14 is an Act providing for the deposit of title deeds in the Registry Offices for safe custody. We very much doubt whether it will prove of much practical value. Nine persons out of ten think they can take care of their own title deeds much better than any public official; the trifling expense of depositing them in the Registry Office will probably deter a good many from taking advantage of the Act.

Provision is made by Chapter 15 for the extension of the Land Titles Act to other counties, cities and towns in Ontario. The conditions on which any county, city or town can secure the extension of the Act to such county, city or town are: (1) The passing of a by-law declaring it expedient that the Act should be extended to such county, city, or town. (2) The providing of suitable accommodation for the officials. Having done this, the Lieut.-Governor in Council may extend the Act to such county, city, or town, and the county, city, or town, then becomes responsible to pay such part of the salaries of the officials and expenses of the office, as the fees of the office prove insufficient to defray. It will not be very surprising if the Act, under these circumstances, is not very widely and eagerly adopted.

After vainly endeavouring for a good many years past to introduce the Torrens system into England on the voluntary principle, we see Lord Halsbury, by his Bill now before Parliament, has at last boldly "taken the bull by the horns" and proposes to establish district registries throughout the country and to make the system compulsory. This, at all events, shows that the Imperial Government is satisfied that the Torrens system is really an improvement. The legislation in this Province seems rather to indicate that our Legislature is not quite convinced of the benefits of the measure, and discredit is practically cast upon it in advance by the timorous way in which the matter is dealt with. If the Legislature is not thoroughly convinced that the Torrens method of registration is an immense improvement, it had no business to introduce it at all. If, on the other hand, it is so convinced, it seems absurd to legislate as if the matter were one of doubtful expediency. Owing to the fact that our Act is not compulsory, it is certain that it will be a work of time to get people to see its advantages, and even when introduced into any locality, applications under it will probably be few until some practical

experience has been gained of its operations. In the meantime the municipallty is burthened with the expense of a staff of officers, and office expenses, for some years while the public are learning the advantages. We are afraid that the Torrens system, by next session, will find itself no further extended than it is at present. Another Statute has also been passed, extending the Land Titles Act to the outlying districts of the Province, but as this Act is not printed in the *Gazette* we are unable to state its effect.

Some amendments are made to the Creditors Relief Act, and a slight amendment is also made to the Mechanics' Lien Act.

An Act has also been passed relating to the guardianship of minors. This Act, which appears to be based on a recent English Statute, very properly gives the mother a voice in the custody of her children, and enables her to appoint a guardian for them, and to be herself their guardian alone, or jointly with others. When guardians are appointed by both parents they are to act jointly. The Act appears to be remedial in its provisions, and intended to remove a grievance. The Legislature has, however, with careful forethought, provided that its provisions, shall not apply to any children, as to whom any application has heretofore been made to any court or Judge with respect to their custody or maintenance, whether such application is, or is not, now pending. But why this particular class of children should be deprived of the benefit of the Act it is not very easy to divine.

The only other Act we think it necessary to mention is an Act respecting distress for rent and taxes. We have already seen that the Legislature has provided a pretty liberal bill of exemptions from execution, and this Act provides that all property exempt from execution shall also be exempt from distress for rent in respect of a tenancy hereafter created, and also for distress for taxes, unless such goods are the property of the party assessed. The Act also contains clauses exempting the goods of third parties. As against an assignee for benefit of creditors, the landlord's right to distrain is restricted to a year's arrears of rent. The tenant is given a right of set-off against his landlord. Tenants claiming exemption are to give up possession, and the necessity of a strict demand of rent in arrear, is done away with as a condition of re-entry.

No session would be complete without an amendment of the Municipal Act. This year an Act of only fifty-five sections is the monument of Legislative industry in this respect.

RECENT ENGLISH DECISIONS.

The *Law Reports* for May comprise 18 Q. B. D. pp. 573-569; 12 P. D. pp. 117-137, and 34 Chy. D., pp. 579-769.

PRACTICE—DISCOVERY IN AID OF EXECUTION—EXAMINATION OF PERSON OTHER THAN DEBTOR—ORD. XLII. R 32 (ONT. R. 366, 367).

The first case calling for notice in the Queen's Bench Division is *Irwell* v. *Eden*, 18 Q. B. D. 588, in which the Court of Appeal (affirming the judgment of a Divisional Court) held that under Ord. xlii. r. 32 (see Ont. R. 366, 367) there is no power to make an order for the examination of any person other than the debtor, or, in the case of a corporation aggregate, other than an officer of such corporation, for discovery of debts, etc., owing to such debtor, in aid of execution.

CHURCH—FREE SEATS—CHURCHWARDEN, RIGHT OF AS TO SEATS IN A FREE CHURCH.

In the case of *Asher* v. *Calcraft*, 18 Q. B. D. 607, a case was stated by magistrates for the opinion of the Court on a question of church law, which is of some interest in this country, where free churches are not uncommon. The respondent was the churchwarden of a church in which the seats were all free. Some young

men and boys had been in the habit of sitting together in the north aisle and misbehaving themselves, and in order to prevent further disturbance, the respondent directed the appellant, a young man, to take a seat in another part of the church; this he declined to do, and resisted the respondent, and pushed past him. He was subsequently convicted of violent behaviour in church, and the question submitted by the magistrates was whether or not the churchwarden had exceeded his authority, and the court (A. L. Smith and Grantham, J.J.) unanimously determined that he had not.

PRACTICE—DISCOVERY—ACTION FOR PENALTIES.

Adams v. *Batley*, 18 Q. B. D. 625, was an action to recover for the infringement of the plaintiff's sole right of representing a dramatic piece. The 4 & 5 Wm. IV., c. 15, s. 15, provided that every person infringing on such right should be liable, for each and every representation, to pay an amount of not less than 40s.; and the question arose whether this section did not impose a penalty upon the offender, so as to preclude the plaintiff in an action to recover the specified amount, from examining him for discovery. The Court of Appeal (affirming Day and Wills, JJ.) held that it did not. Lord Esher, who delivered the judgment of the court, being of opinion that it was clear that the payment of the 40s. was intended by the Act to be by way of damages, and as compensation to the plaintiff, and not by way of penalty. None of the other cases in the Queen's Bench Division require notice.

WILL—MUTILATION OF WILL—REVOCATION OF APPOINTMENT OF EXECUTORS.

The only case in the Probate Division which seems to call for remark is *In the Goods of Maley*, 12 P. D. 134. By his will a testator appointed two executors. Some time afterwards he had a dispute with one of the persons named as executors, and there was evidence that he had said that he "had cut that rascal Clark out of his will with a pair of scissors." On his death the will was found with the clause appointing the executors cut out, the piece cut out being found with it in the same bag. The president, Sir James Hannen, held that this mutilation of the will amounted to a revocation of the appointment of the executors, and administration with the will annexed was granted to the sole legatee.

PARTNERSHIP—RESCISSION OF CONTRACT—INDEMNITY.

The first case to be noticed in the Chancery Division is *Newbigging* v. *Adam*, 34 Ch. D. 582, in which the Court of Appeal decided (affirming Bacon, V.-C.) that when a person has been induced to enter into a contract of partnership by misrepresentations not of such a character as to entitle him to bring an action for damages for deceit, he has a right, on the contract being rescinded by the Court, to be indemnified against the debts and liabilities of the partnership. This relief he was held entitled to, not by way of damages, but simply for the purpose of putting him back in the position he was in before the making of the contract which is rescinded.

PERSONAL REPRESENTATIVE CARRYING ON TRADE—GOODS BOUGHT BY PERSONAL REPRESENTATIVE—RIGHTS OF VENDOR.

In re Evans, *Evans* v. *Evans*, 34 Chy. D. 597, an administratrix had carried on the trade of the intestate, and for the purpose of such trade, bought a quantity of cement. An administration action having been brought against the administratrix, in which a receiver and manager was appointed, this cement was sold with other effects under an order in the administration action. The vendors of the cement had recovered a judgment against the administratrix, but execution had not issued thereon, and they applied to be paid the amount of their judgment out of the proceeds of the sale of the cement. Kay, J., refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the intestate's estate, from which order the vendor appealed; and it was held by the Court of Appeal that the cement, as between the vendors and the administratrix, was the property of the administratrix, she being a debtor to them for the price, and that as between the administratrix and the estate the cement belonged to the estate, subject to the right of the administratrix to be indemnified for the price, if she was not a debtor to the estate; and that the vendors could not have any higher claim than hers, and were not entitled to any more than the order of Kay, J., gave them The Court of Appeal, however, expressed some doubt whether the order was right in declaring the vendors entitled to a lien.

Recent English Decisions.

Appointment of new trustee—"Person of unsound mind"—Trustee Act, 1850.

In re Martin, 34 Chy. D. 618, North, J., held (and his decision was affirmed by the Court of Appeal) that a person is of "unsound mind" within the meaning of the Trustee Act, 1850, when, from permanent incapacity of mind, he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition. A contrary opinion expressed by Lindley, L.J., *In re Phelps*, 31 Ch. D. 351, was considered to be erroneous, Lindley, L.J., himself concurring.

Company—Winding up—Distress—Property mortgaged beyond its value—R. S. C. c. 129, ss. 16, 17—Costs of sale.

A question arose *In re New City Constitutional Club Co.*, 34 Chy. D. 646, whether property of a company mortgaged for more than its value is the property of the company, so as to prevent its being sold under distress for rent due by the company. After a winding-up order, Kay, J., held that the landlord was entitled to distrain, notwithstanding 25 & 26 Vict. c. 89, ss. 87, 163 (R. S. C. c. 129, ss. 16, 17). On appeal from the order of Kay, J., the mortgagees consented to release their rights as mortgagees, and to rank as ordinary creditors; but the Court of Appeal, notwithstanding this consent, affirmed the order of Kay, J. The goods had been sold by the liquidator, pending the application for leave to distrain, and the proceeds paid into Court by agreement, less the auction charges. The liquidator claimed to be entitled to be paid out of the proceeds his costs of the sale, but this was refused by Kay, J., and the Court of Appeal affirmed the refusal.

Mortgage—Lunatic mortgagee—Appointment of person to convey—Trustee Act, 1850, s. 3.

In re Nicholson, 34 Chy. D. 663, was an application under the Trustee Act, 1850, s. 3, for the appointment of a person to convey a mortgaged estate, in the stead of the mortgagee, who was of unsound mind, for the purpose of effectuating a transfer of the mortgage. The application was granted.

Practice—Amendment of Notice of Appeal—Extending time to appeal.

In re Crosby, Munns v. *Burn*, 34 Chy. D. 664, the Court of Appeal somewhat relaxed the stringent rules which have been laid down respecting the right to appeal after the time has elapsed. In this case the party desiring to appeal within the proper time gave a four days' notice of appeal. After the time for appealing had elapsed, the respondent wrote to say that the notice was bad, as it ought to have been a fourteen days notice. The appellant then applied to amend, by substituting fourteen days for four days in the notice of appeal, but at this time more than fourteen days from the service of the notice had elapsed. The Court of Appeal, although holding that the notice of appeal was bad, and could not be amended as asked after the fourteen days had expired, nevertheless, as the applicant had given a distinct notice of appeal within the proper time, extended the time for appealing so as to allow a proper notice to be served.

Solicitor trustee—Profit costs.

The case of *In re Corsellis, Lawton* v. *Elwes*, 34 Chy. D. 675, is an appeal from the decision of Kay, J., 33 Chy. D. 160, which we noted *ante* vol. 22, p. 414. The Court of Appeal made two important variations in the judgment appealed from. In the first place, the profit costs made on an application for maintenance under the summary procedure of the Court, to which the solicitor trustee and his co-trustee were respondents, and in which the latter's firm acted through their London agents, as solicitors for both trustees, were allowed. In this respect, the Court of Appeal considered the case governed by *Cradock* v. *Piper*, 1 Mc. & G. 664, which, though not approved, had, nevertheless, been so long acted on, that the Court of Appeal held it could not now be overruled. The attempt to limit the effect of that decision to the case of costs incurred in a hostile suit was repudiated. The exception to the general rule that a solicitor trustee may not make profit costs out of the trust estate established by *Cradock* v. *Piper* is thus stated by Cotton, L.J.:

> When there is work done in a suit not on behalf of the trustee who is solicitor alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee. For that there is an obvious reason; that it is not the business of a trustee, although he is a solicitor, to act as solicitor for his co-trustee. But the excep-

tion in *Cradock* v. *Piper* is limited expressly to the costs incurred in respect of business done in an action or a suit.

In the second place the Court of Appeal held (reversing Kay, J.) that the fees received by a member of the solicitor trustee's firm as steward of a manor, to which office he had been appointed by the trustees, and which fees were brought into the partnership account of the solicitor trustee's firm, should be allowed, because such fees were not received by the solicitor *qua* solicitor, and it was no part of the trustees' duty to act as steward of the manor.

The Court of Appeal, however, affirmed Mr. Justice Kay in holding that the solicitor trustee must account for profit costs made by his firm in proceedings, in which they had acted as solicitors for the receiver of the trust estate; on the ground that by acting for the receiver the solicitor trustee had put himself in a position adverse to his duty as trustee; and the Court of Appeal also held that Kay, J., was right in holding that profit costs incurred by the solicitor trustee's firm in preparing leases of the trust estate, the costs of which had been paid by the lessees, must be accounted for by the solicitor trustee to the trust estate.

ARREST OF DEBTOR—FIDUCIARY CAPACITY—AUCTIONEER

In *Crowther* v. *Elgood*, 34 Chy. D. 691, the Court of Appeal affirmed the decision of Kay, J., holding that an auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors Act, 1869, s. 4, ss. 3, and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a Court of Equity, he is liable to attachment, whether he still holds the money or has parted with it.

WILL—CONSTRUCTION—MARRIED WOMAN—RESTRAINT ON ANTICIPATION.

In re Grey, Acason v. *Greenwood*, 34 Chy. D. 712, is a decision of the Court of Appeal (affirming the judgment of North, J., noted *ante* p. 68).

WILL—GIFT AT TWENTY-FIVE—CONTINGENT GIFT—REMOTENESS.

In re Beavan's Trusts, 34 Chy. D. 716, was an application to determine the right to a trust fund which had been paid into Court under the Trustee Relief Act. The fund in question had been bequeathed by a testatrix by her will to her sister for life, and after her death the interest to be paid to the testatrix's daughter (she having first attained twenty-five); if the daughter married with consent of the executors, and died, "leaving children, the interest to be appropriated for the maintenance and education of such children," "and the principal to be divided amongst them as they shall severally attain twenty-five; after the death of the sister, and in the event of the daughter marrying without consent, or marrying with consent and dying without issue," then over. The daughter survived the testatrix, attained twenty-five, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1886, having had two children who survived her. These children claimed to have a vested interest in the fund, and their right was contested by the next of kin who claimed that the gift to them did not vest until they attained twenty-five, and was therefore void for remoteness. Kay, J., held that the fund vested in the children who survived the daughter.

MORTGAGE—SALE—INTEREST—RIGHT OF MORTGAGEE SELLING UNDER POWER TO RETAIN MORE THAN SIX YEARS' INTEREST—STATUTE OF LIMITATIONS.

In re Marshfield, Marshfield v. *Hutchings*, 34 Chy. D. 721, Kay, J., following *Edmunds* v. *Waugh*, L. R. 1 Eq. 418, held that when a mortgagee sells under a power of sale in his mortgage he is entitled, as against a second mortgagee, to retain more than six years' arrears of interest. See *Ford* v. *Allen*, 15 Gr. 565, to the same effect.

PRACTICE—STRIKING OUT PLEADING—NECESSARY PARTIES—REASONABLE CAUSE OF ACTION.

In *Shafto* v. *Bolckow*, 34 Chy. D. 725, the action was brought by a copyholder to restrain the working of coal under his land by A, who claimed to be entitled to do the acts complained of by virtue of a lease from B, the lord of the manor. B was, by amendment, added as a defendant, it being alleged in the statement of claim that he claimed the right by himself and his lessees to work the coal; that he justified the acts of A, and had received and claimed to be entitled to receive from A rents and royalties in respect of such wrongful working. B applied to strike out the amended statement of claim on the ground that it disclosed no cause of action against

him, and that the action might be dismissed as against him; but this application was refused by Chitty, J., who said, at p. 729:

I have always understood it to be the settled practice that where a person claims a right, that is a ground for making him a party to an action for an injunction.

COMPANY—ACTION BY DEBENTURE HOLDER ON BEHALF OF HIMSELF AND OTHERS—JUDGMENT—RECEIVER.

In *Hope* v. *Croydon & Norwood Tramways Co.*, 34 Chy. D. 730, the action was brought by a debenture holder, on behalf of himself and other debenture holders of the same class, to realize the amount of his claim. On a motion for judgment, a question arose as to the proper form of judgment, the plaintiff being himself a creditor for £1,400, while the whole amount of the debentures of the same class amounted to £15,000. North, J., thought it would be improper to give judgment in the ordinary form for £15,000, or to give judgment for the plaintiff for £1,400, as that would be putting him in a better position than the other debenture holders on whose behalf he sued; he therefore declared that the debenture holders were entitled to stand in the position of judgment creditors for the sum of £15,000 and interest, and appointed a receiver.

MORTGAGE DEBT—MORTGAGE IN JOINT NAMES—JOINT TENANCY, OR TENANCY IN COMMON—JOINT ACCOUNT CLAUSE.

A question arose *In re Jackson, Smith* v. *Sibthorpe*, 34 Chy. D. 732, as to whether a mortgage which had been taken in the joint names of three sisters, as joint tenants, and which contained a clause declaring the mortgage money belonged to the mortgagees on a joint account in equity, as well as at law, was, notwithstanding this declaration, the property of the mortgagees as tenants in common. It appeared by the evidence that the money advanced on the security of the mortgage formed part of the proceeds of the estate of a deceased brother of the mortgagees, to which the mortgagees were entitled under his will as tenants in common. It also appeared that the mortgagees, in making their wills, treated the mortgage money as belonging to them as tenants in common; and it was therefore held by North, J., that notwithstanding the terms of the mortgage, and notwithstanding that it was sworn that it had been explained to them by their solicitor, the mortgagees were entitled to the mortgage money as tenants in common.

WILL—CONSTRUCTION—CONDITION PRECEDENT.

In re Hartley, Stedman v. *Dunster*, 34 Chy. D. 742, a testator bequeathed his residuary personal estate to such persons as should, within one year from his death, establish their right or title thereto as his next of kin, with a gift over in default. An order for limited administration, including an inquiry as to next of kin, was made shortly after the testator's death. The persons who were next of kin did not bring in a claim within the year. The question then arose whether the gift over took effect, and North, J., held that it did. The fact that the administration order was not for a general administration of the estate, in his opinion, distinguished the case from *Tollner* v. *Marriott*, 4 Sim. 19.

SALE OF BUSINESS AND GOODWILL—COVENANT BY VENDOR NOT TO CARRY ON BUSINESS UNDER HIS NAME—INJUNCTION.

Vernon v. *Hallam*, 34 Chy. D. 748, was an action against the vendor of a business and goodwill, who had contracted not to carry on business either by himself or jointly with any other person, under the name of the business he had sold,—to restrain him from carrying on business contrary to such covenant, and also from soliciting the customers of the old house to deal with him. Stirling, J., granted the injunction restraining the defendant from using the name of the business he had sold; but, following *Pearson* v. *Pearson*, 27 Chy. D. 145, which he considered overruled *Labouchere* v. *Dawson*, 13 Eq. 322, he refused to enjoin the defendant from soliciting customers.

RECTIFYING SETTLEMENT.

Tucker v. *Bennett*, 34 Chy. D. 754, is a decision of Kekewich, J., in an action brought by a married woman to rectify the trusts of her marriage settlement. The settlement was drawn by the wife's brother, who was a solicitor, who settled the terms with the father and the husband, but did not refer to the intended wife, and she was not informed of its terms. The settlement dealt with money given by the father of the wife, and money of the husband, and there was a covenant to settle the wife's after-acquired property on her for life, and after her death, in default of issue, on her next of kin. The rectification sought was the

introduction of a power to the wife to appoint her after-acquired propertyby will, in default of issue, and giving it to her absolutely in case she survived her husband. No issue had been born of the marriage, and the action was brought fourteen years after the marriage. Kekewich, J., held that the father could not be considered the agent of the daughter so as to bind her by the settlement: that the settlement was in an unusual form; that the husband's assent to the settlement did not, as he was not affected by the proposed rectification, preclude its being made; and he therefore decreed the rectification as prayed.

POSSESSION—INFANTS' PROPERTY—BAILIFF FOR INFANTS.

The only remaining case to be noticed is *Wall* v. *Stanwick*, 34 Chy. D. 763, which is a decision of Kekewich, J., on the rights of infants as against persons in possession of their real property. The owner of a public house and cottages devised them to his widow for life, or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in, and manage the public house; and she received the rents of the cottages, and maintained the children. One of the children, whilst an infant, married, but she and her husband, for some months, lived in the public house. They then left it, and had not since received anything from the estate of the testator, and she and her husband brought this action against her mother for one-fourth of the rents and profits. Kekewich, J., held, that after her second marriage the mother was in possession as bailiff for her infant children, and not as guardian by nurture, or by leave of her children, or as a trespasser; and though on her daughter's marriage the right to receive her share of the rents passed to her husband, that this did not change the character of the mother's possession, nor was it changed when the daughter came of age, and that the mother was therefore a trustee, and liable to account for the rents and profits.

REPORTS.

FIRST DIVISION COURT OF THE COUNTY OF ONTARIO.

MILNE v. CANADIAN PACIFIC RAILWAY CO.

Railway tickets—Duty of station agents as to care thereof—Liability for deficiency without reasonable explanation—Omission to date ticket.

A railway station agent, to whom tickets are issued for sale, is bound to account therefor, in cash or tickets, and must give a reasonable explanation for any deficiency, or otherwise be charged the amount which the company would have earned if the tickets had been sold.

The omission by a station agent to date a passenger ticket does not invalidate it.

[Whitby—October 23, 1886.

The plaintiff had been agent of the defendants at a station on their line named Pontypool, at a salary of $35 per month.

Among his other duties, he had charge of the passenger tickets from his station to others on the line, and was required to make returns of the amount sold, and to pay over the cash proceeds. He gave receipts for all tickets received from the Head office.

On leaving the defendants' employ, the incoming agent took over his office, and tickets were found short amounting to $14.60. The plaintiff refused to be charged with this, and sued the Company for the full amount of his arrears of salary. The defendants paid the claim with costs into court less the above sum of $14.60.

The plaintiff gave no evidence to account for the loss of the tickets. It was admitted that the missing tickets had not turned up at the central office.

G. Y. Smith, for plaintiff.

R. M. Wells, for defendants.

DARTNELL, J.J.—Although the amount involved in this action is comparatively small, the principle involved is of serious import to corporations and employes. The *ad captandum* argument was used that it was beneath the dignity of a large corporation to resist this claim; but it is obvious that the larger the corporation the greater should be the vigilance in guarding against little leaks. A multitude of such will sink a large ship. A pin-scratch may be but a trifling wound, but a man may bleed to death if pricked all over his body. Upon the faithful and efficient performance of every duty by

all the units of the vast army of the employees of an immense corporation, will depend the earning powers of the company.

It was stated that no express authority can be found upon the matter in controversy, and I myself have been unable to find any after diligent search. I think, however, it is not difficult to arrive at a judgment, based upon general and well-defined principles of law.

It will be necessary in the first place to consider and ascertain what is the nature of the documents (for such railway tickets are) in respect of which the defendants seek to make a deduction from the plaintiff's claim; and how far possession and user of such tickets by parties who obtain them unlawfully may affect the defendants' interests.

"Tickets issued by a railway company are *prima facie* evidence of a contract between the railway and the passenger to transport the latter, and his personal baggage, from the station named therein as the place of departure to the station named therein as the place of destination; and is held to be a receipt, token or voucher, showing payment for the passage, rather than a contract; and by its purchase the relation of passenger and carrier is said to be consummated." Wood on Railways, vol. 2 chap. 21, sec. 346, page 1394. See *Bradshaw & South Boston R. R. Co.*, 135 Mass. 407; *Happord* v. *Grand Rapids R. R. Co.* (Mich.) 18 N.-W. Rep. 580; *Frederick* v. *Marquette R. R. Co.*, 37 Mich. 342.

Regina v. *Boulton*, 3 Cox C. C. 576, decides that a railway ticket is a chattel; and in *Regina* v. *Beacham*, 6 Cox C. C. 181, it was held that the fraudulent taking of a railway ticket for the purpose of using it to travel, and so defrauding the railway company, is larceny; although the ticket would, if used, be returned to the company at the end of the journey.

By our own Larceny Act (sec. 19), the stealing of a railway ticket is made a felony.

A railway agent is allowed a reasonable time to remit money received for tickets or freight, otherwise he would not be liable if robbed. *Robinson* v. *Illinois Central Ry. Co.*, 30 Iowa 401.

From these cases, and the well known usages and customs of railway corporations, it may be deduced that a railway ticket is a valuable security; the holder of it has a right to travel upon its production (subject to any limitations expressed upon its face), and, to a certain extent, it is as much negotiable by delivery as a bank bill.

The latter is redeemable in gold, the former is redeemable in so many miles of travel. Indeed, in certain cases, it is redeemable in cash; for by "The Railway Passengers Ticket Act," of 1882, popularly known as the "Scalpers Act," (45 Vict. cap. 41), it is provided "That the company shall repay to any ticket holder the cost of his ticket if unused in whole or in part, less the ordinary and regular fare for the distance for which such fare had been used."

It would be a dangerous thing for a conductor to enquire into the title of each passenger to the ticket he produces, and it would be against the general interests of the public that he should do so.

It was argued that as the missing tickets were not dated that they were invalid. I do not agree with this. I do not think a conductor would be safe in rejecting an undated ticket. The date is placed upon it for the convenience of the company, to show the time from which may be calculated the limit of their liability, in accordance with the terms endorsed upon the ticket, or by operation of law. Again, by sec. 3 of the Act above quoted, it is provided that when tickets are sold by authorized agents other than station agents, the name of such agent and the date of sale must be written or stamped upon the ticket; and sec. 7 provides in effect that the sale of tickets in the ordinary way by station agents shall not be affected. By implication, therefore, the dating and countersigning of a ticket is not necessary in the latter case, but is confined to the issue of tickets by agents other than station agents. Nor is there force in the argument that, because the missing tickets have not turned up at the audit office (it being the duty of the conductor to transmit them on taking them up) they have not been used, and that, therefore, the company has lost nothing. It is well known that a large percentage of tickets, *bonâ fide* bought and used, for various reasons, are not presented to or taken up by the conductors, and so never reach the audit office. These missing tickets are even now liable to be presented, and the holders travel thereon, and the defendants defrauded of the fare which would have reached their treasury, if accounted for in the usual way.

If I am intrusted with a number of tickets to sell for a charitable concert, I must account in cash or tickets for the whole number, or give some reasonable explanation for any deficiency. Or if a friend hand me $500 to take care of, and on returning, even the identical package, with a shortage of several bills, surely I must give some satisfactory reason for the shortage. In these cases I would be a gratuitous bailee, but none the less liable.

But the plaintiff in this case was a bailee for hire. It was just as much within the scope of his duties to take reasonable care of these tickets, the loss of which and their subsequent user would deprive the defendants of so much earnings, as stationery, books, office furniture or other property

of the defendants, intrusted to his care. He would not be liable for loss by fire or robbery, unless caused by his neglect. I see no distinction in this case and that of a teller in a bank in charge of so much cash. Such a bailee must give a reasonable explanation of any deficiency, and as the plaintiff does not attempt in any way to account for the four missing tickets it appears to me beyond doubt that he was properly charged with the sum of $14.60, and I give judgment for him for the amount paid into court only. The defendants will be entitled to charge against the latter amount any witness fees paid by them in order to establish their defence.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

SMITH v. CITY OF LONDON INSURANCE CO.

Insurance—Misdescription of premises—Waiver—Arbitration—Statutory conditions.

The judgment of the Q. B. D., 11 O. R. 38, was affirmed on appeal (10th May, 1887).

Robinson, Q.C., and *C. Miller*, for the appellants.

Osler, Q.C., and *Wallace Nesbitt*, for the respondent.

ARSCOTT v. LILLEY.

Magistrate, action against—Conviction not quashed—R. S. O. c. 73, s. 19—O. J. A.—Dismissal of action against magistrate—Costs—Appeal—Irregularity.

The judgment of the Common Pleas Division, 11 O. R. 285, was affirmed as regards the dismissal of the action, but

Held, reversing the judgment below, that R. S. O. c. 73, s. 19, has not been repealed by any of the provisions of the O. J. A., or otherwise, any doubt on the subject having been removed by the re-enactment of s. 19 in the new Revised Statutes of Ontario; and therefore the dismissal of the action should be with costs to the defendant, Lilley, the magistrate, as between solicitor and client.

Held, also, that the plaintiff could not object to the appeal as irregular, on the ground that having been begun by both defendants, it was continued by only one, inasmuch as the plaintiff had availed herself of the appeal for the purpose of bringing on a cross-appeal.

Per OSLER, J.A.—If there was anything in the objection it should have been taken by way of substantive motion to strike out the appeal for irregularity.

EASTMAN v. BANK OF MONTREAL.

Assignment—Proof of claims—Collateral securities.

An appeal from the judgment of BOYD, C. (10 O. R. 79), was dismissed by reason of the members of the Court being divided in opinion.

Per HAGARTY, C.J.O., and OSLER, J.A.—The judgment below should be affirmed.

Per BURTON and PATTERSON, J.J.A.—The appeal of the plaintiff against the Bank of Montreal, so far as it relates to the character of the debts upon the discounted notes, should be allowed.

IN RE O'MEARA AND THE CORPORATION OF THE CITY OF OTTAWA.

Municipal Act, 1883, *s.* 503, *s.* 497 *s. s.* 4-6—*By-law—Sale of meat.*

The judgment of WILSON, C.J., 11 O. R. 603, was affirmed.

McCarthy, Q.C., and *Clement*, for the appellant.

J. Maclennan, Q.C., for the respondent.

MCKENNA v. MCNAMEE.

Executory contract—Destruction of subject-matter of executory contract by vis major—Rescission of contract.

Where an executory contract is entered into respecting property or goods, if the subject-matter be destroyed by the act of God or *vis major*, over which neither party has any control, and without either party's default, the parties are relieved. The defendants, who had had a contract with the Government of British Columbia for the performance of a public work, but had forfeited it, after a part of the work

had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract, and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement referred to the contract as an existing one, but the fact was, as was fully shown by all the parties, that at the time of making the agreement the contract had been forfeited, and the Government had taken possession of the works. No advantage was taken by the defendants; the plaintiffs had examined the contract with the Government, and understood as well as the defendants the exact position of affairs; but all trusted to the possession of certain influence by which they hoped to get back the contract, and resume work upon it.

Held, affirming the judgment of the Queen's Bench Division (not reported), that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking.

NEVITT v. MCMURRAY.

Sale—Estoppel—Registration of plan—Vendor and purchaser.

M., being the owner of land adjoining lot 40 on registered plan 396, which belonged to B., on the 5th August, 1880, filed a plan, 327, in which he included lot 40 as part of lot M on plan 327. M., the next day, mortgaged lot M to the O. Co., who sold under power of sale to W., taking back a mortgage. The O. Co. and W. had notice from the registry office that M. had no title to the part of lot M otherwise described as lot 40. On the 29th July, 1880, B. had written to M.: "I hereby offer to sell to you lot 40 . . . for the sum of $250, to be paid six months after this date, otherwise this offer to be null. I agree to pay off incumbrances on this when paying off whole"; and M. had written at the foot, "I hereby accept the above offer." This agreement was not carried out within six months; but on the 1st January, 1883, B. sold and conveyed lot 40 to M. for $400, of which $100 was paid in cash, and $300 secured by a mortgage made by M. (at the request of B.) to the plaintiff.

Held, reversing the decision of PROUDFOOT, J., that the original contract between B and M. was not binding on M.—it was merely an option given to M.—and he not having signified his acceptance within six months the land was free at the time he registered his plan and mortgaged to the O. Co.; and the subsequent sale and conveyance was upon a new bargain and contract.

No interest in lot 40 passed by M.'s mortgage to the O. Co., and the subsequent conveyance to M. went to "feed the estoppel" created by M.'s prior mortgage, only to the extent of M.'s interest, which was that of owner of the equity of redemption, or of the lot charged with $300, and it made no difference that the $300 mortgage was taken to the plaintiff instead of to B., the effect being that W. was the owner of lot 40, subject to a first mortgage of $300 in favour of the plaintiff, and to a second mortgage in favour of the O. Co.

B., having by his bargain with M. and the conveyances in pursuance of it, created in M. the status of owner, and in the plaintiff that of mortgagee, was not in a position, nor was the plaintiff, to complain of the registration of plan 327.

CANADA ATLANTIC RY. CO. v. TOWNSHIP OF CAMBRIDGE.

By-law—Assent of electors—Equality of votes—Casting vote—R. S. O. c. 174, s. 52.

The by-law in question was one to raise upon the credit of the defendant municipality money not required for their ordinary expenditure, and not payable within the same financial year, in order to grant a bonus to the plaintiff.

At the voting of the electors upon the by-law, the ballots for and against it were equal, and the clerk of the municipality, who also acted as returning officer, verbally gave a casting vote in favour of it. This occurred in 1880, and therefore before the enactment contained in 46 Vict. ch. 18, s. 321.

Held, reversing the judgment of the Common Pleas Division, 11 O. R. 392, that the Municipal Act, R. S. O. c. 174, s. 152, is not applicable to the case of voting on a by-law, therefore the casting vote of the clerk was a nullity, and the by-law did not receive the assent of the electors of the municipality within the meaning of R. S. O. c. 174, s. 317

Such a defect could not be cured by promulgation of the by-law.

Per BURTON, J.A.—The provisions of s. 248 of the Municipal Act of 1873, 36 Vict. c. 48, do not apply to by-laws for granting bonuses to railways, and the judgment of the Supreme Court of Canada in *Canada Atlantic Ry. Co.* v. *City of Ottawa*, 12 S. C. R. 377, does not so decide.

WOODRUFF v. MCLENNAN.

Foreign judgment—Defence to action on foreign judgment—Evidence.

In an action upon a foreign judgment the defence was that the plaintiff fraudulently misled the foreign court by swearing what was untrue, to his knowledge, at the trial of the original action. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a certain contract between the plaintiff and defendants, and the contest was upon the question whether the services were within the contract or were extra. On this question the evidence of the plaintiff and of one of the defendants, and of one or two other witnesses, was given at the trial in the foreign court, the contract and certain letters were put in, and the Judge's charge to the jury showed that the whole evidence was fully before the attention of the court. The verdict in the foreign court was in favour of the plaintiff, but it was now sought to establish the falsehood of the plaintiff's statements with regard to the extra services.

Held, affirming the judgment of the Common Pleas Division (not reported) (Burton, J. A., dissenting), that evidence under the defence was properly rejected at the trial, for what the defendant proposed to do was to try over again the very question which was in issue in the original action. The charge of fraud was superadded, but that charge involved the assertion that a falsehood was knowingly stated, and before the question of scienter was reached a conclusion of fact adverse to that arrived at by the Michigan jury would have to be adopted.

Per BURTON, J. A.—In admitting evidence under the defence the court would not be assuming to re-try the issues disposed of in the foreign court. The finding upon these issues is conclusive, and cannot be questioned here, but it can be shown that the decision arrived at was obtained by fraud practised upon the foreign court, and that right cannot be defeated because, in order to establish it, it becomes necessary to go into the same evidence as was used on the former trial, to sustain or defeat that issue. The issues are not the same, although if the facts now discovered could have been shown at the former trial they would have secured a different result.

The authority of the decisions of the English Court of Appeal, and the case of *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 395, discussed.

CHANCERY DIVISION.

Robertson, J.] [May 18.

STUART v. GROUGH ET AL.

Demurrer—Action in name of receiver.

S. recovered a judgment against S. S., and plaintiff was appointed the receiver in that suit to receive S. S.'s share of his father's estate which he was entitled to under his father's will. The share not being paid over, plaintiff brought action in his own name against the father's executors to recover the amount. The defendants demurred, on the ground that the cause of action, if any, was vested in S. S., and that plaintiff had no right to bring the action.

Held, that the right of action was in S. S., and not the plaintiff; by his appointment he became entitled to receive the amount, and the defendants, the executors, having notice of his appointment, could not safely pay over the money to any other, and in case they refused to pay over, then the plaintiff should apply for leave to bring an action in S. S.'s name.

The plaintiff, on receipt of the amount, could give a proper discharge of the claim to the executors, but when it became necessary to litigate in order to recover, it should be done in the name of S. S., he being the only person having title to recover at law; *McGuin* v. *Fretts* (not reported) cited and followed.

Moss, Q.C., for the demurrer.

Mackelcan, Q.C., contra.

PRACTICE.

Wilson, C. J.] [May 6.

RE MONTAGUE AND THE TOWNSHIP OF ALDBORO'.

Costs—County Court scale—Arbitration—Counsel fees.

In taxing the costs of an arbitration upon the County Court scale, no greater counsel fee can be allowed than is provided by the County Court tariff, viz.: $25, although the attendance of counsel upon the arbitration has been for several days.

F. E. Hodgins, for the township of Aldboro'.

C. J. Holman, for Montague.

Boyd, C.] [May 25.

APPLEMAN v. APPLEMAN.

Will—Counter-claim—Propounding earlier will—Fraud—Particulars.

The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills of the testator's, under which, in the event of the last in date being invalidated, he claimed.

Held, a proper matter of counter-claim.

A general defence of fraud is admissible in an action to establish a will; but where such a defence was pleaded the defendant was required to give particulars forthwith after the examination of the plaintiff, and in default, to be debarred from giving evidence on that issue.

Browne v. *Thomas*, 1 Spinks Ec. & Ad. 31, followed.

F. W. Hill, for the plaintiff.

F. E. Hodgins, for the defendant.

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee 10r Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887, 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which speci stress will be laid.

Law Society of Upper Canada.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

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DIARY FOR JULY.

1. Fri....Dominion Day. Long vacation H. C. J. and Sup. Court of Canada begins.
3. Sun...*4th Sunday after Trinity.* Quebec founded, 1608.
4. Mon...C. C. term begins, except in York.
9. Sat.....C. C. term ends, except in York.
10. Sun...*5th Sunday after Trinity*
13. Wed..Sir John Robinson 7th C. J. of Q. B. 1829.
17. Sun...*6th Sunday after Trinity.* Law Society incorporated, 1797.
22. Fri.....W. H. Draper, 9th C. J. of Q. B., 1863. W. B. Richards, 3rd C. J. of C. P., 1863.
23. Sat....Act uniting Upper and Lower Canada assented to, 1840.
24. Sun...*7th Sunday after Trinity.* Lundy's Lane, 1814.
28. Thur..Wm. Osgoode, first Chief Justice of Q. B., 1792.
31. Sun...*8th Sunday after Trinity.*

TORONTO, JULY 1, 1887.

DURING the long vacation, following our usual custom, we shall, for this and the following month, issue but one number each month instead of two.

THE regular September Sittings of the Divisional Court of the Chancery Division this year will commence on the 5th day of September next, instead of on the 1st September as appointed by the Rules.

THE QUEEN'S JUBILEE.

THE fiftieth anniversary of Her Majesty's accession has drawn forth from her faithful subjects in all parts of the empire demonstrations of rejoicing. The Dominion of Canada has not been behind hand, and throughout its broad domain religious and festive commemorations of the event have everywhere been held.

To one accustomed to the exuberant manifestations of feeling common in an English crowd, it must often appear that we Canadians are inclined to be somewhat cold and lacking in loyal enthusiasm. Though not so loud-tongued, perhaps, as our brethren across the sea, beneath an apparent coldness, however, there runs a deep current of loyal feeling which, on occasions of this kind, comes to the surface.

In no part of the Queen's dominions are to be found more loyal and faithful subjects than in this great Dominion, built up, as it has largely been, during her long and happy reign.

From a legal point of view, Her Majesty's reign has been one that will ever be a memorable era in the history of our law.

During this period, the old intricate system of pleading and practice, which so frequently left the victory in a law suit, not with the litigant who had the merits on his side, but with the opposite party who had happened to employ the subtler lawyer, has been swept away. On the whole, we think, all modern lawyers, and certainly all litigants, must agree that the disappearance of the technicalities which distinguished the system of the past, has at least advanced the cause of justice.

While the first Common Law Procedure Act was the death-blow of the old system of procedure, it has in its turn been superseded by the Judicature Act which attempts still further to carry on the work of reform. It is, perhaps, premature to speak of the comparative merits of the latter Act, as in this country, the few years it has been in force, and the state of flux in which it still remains, prevent a proper judgment on its merits. Suffice it to say that its main scheme of consolidating the courts and providing one uniform system of procedure for all civil suits is sound, and, when it has been adequately worked out in actual practice, cannot fail to be productive of public benefit.

While the practice and procedure of the courts have been simplified, the law itself has been also very greatly improved. The foundation of an important part of this

work is no doubt to be found in the reports of the real property commissioners. Parliament, proceeding upon an adequate knowledge of the evils in the old system, and of the nature of the remedies necessary to be applied supplied by these reports, has carried on the work of reform gradually but surely, and unaccompanied by any violent disturbance of the rights of property. The Real Property Descent Acts whereby the right of primogeniture was abolished, and the succession to real and personal property has been assimilated —the Acts shortening the period of limitation within which suits may be brought—the Disentailing Act—have all been so many steps forward in the improvement of the law of real estate. They are, however, but steps, and we may believe will soon, in obedience to the spirit of the age, lead up to still further improvements. This reign has also witnessed the abolition of the barbarous practice of imprisonment for debt.

The extension of the system of representative government to Her Majesty's colonial possessions has been productive of manifold benefits, both in strengthening the bonds of amity between the colonies of the empire and their common centre, and also in developing in Her Majesty's colonial subjects that spirit of self-reliance and contentment which is essential to their prosperity. If, in any colony, her subjects are ill-governed, they have almost everywhere the consciousness that the remedy is in their own hands.

The profession of the law is a profession in which loyalty to the chief magistrate must always be a distinguishing characteristic. The solemn oath which is required o every practitioner "to be faithful and bear true allegiance" adds the sanction of religion to that which duty and interest alike demand. The prosperity of lawyers is intimately bound up with the prosperity of the community in which their lot is cast. Upholding the majesty of the law, and reverence and respect for the chief magistrate, the executive of the law, is only natural for those whose whole life-work is to assist in administering the law. Law and lawyers flourish best when peace and prosperity, and respect for law and order, are maintained. During the Victorian era the law and lawyers have prospered, because it has been pre-eminently the reign of law and order. Scattered throughout the land the legal profession is capable of exerting a vast influence for good in the community; to them, in a large measure, belongs the duty of promoting that sentiment of personal affection and loyalty to the Crown which is after all but another name for loyalty to law and order. In the Dominion it has been amply demonstrated that loyalty to the Crown is perfectly consistent with a most democratic state of society, and notwithstanding all the blandishments of our cousins to the south of us, there is to-day no appreciable public sentiment in favour of imitating their example, and cutting ourselves adrift from the glories and traditions of the motherland, or the benign sway of a Queen whose constitutional regard for the rights of her subjects, and whose spotless and unsullied life have endeared her to the hearts of all classes of her people. Whatever radical philosophers and politicians may say to the contrary, the personal influence and example of the Sovereign of the British Empire is still a vital force permeating all ranks of society, and exerting its influence in indirect ways far and wide. To have had a sovereign fifty years upon the throne, distinguished as the constant friend of virtue, and foe of vice, is not the least of the blessings for which we may be thankful on this auspicious occasion. We echo but the sentiments of the profession in Ontario when, on this the anniversary of Confederation, with heart-felt love we say, GOD SAVE THE QUEEN.

SIR MATTHEW CAMERON.

It is but a few short weeks ago since we had the pleasant office of congratulating Sir Matthew Cameron on the well-merited honour of knighthood which had been recently conferred on him, and now it is our melancholy duty to record his untimely death, whereby the Bench of this Province is robbed of one of its most conspicuous ornaments, and the profession at large has to mourn the loss of one of whom it had every reason to be proud.

Sir Matthew Cameron, as his name implies, was of Scotch descent. His father was Mr. John McAlpine Cameron, a gentleman who held in his day the offices of Postmaster at Dundas, the Deputy Clerkship of the Crown for the Gore District, subsequently a clerkship to the committee of the Parliament of Upper Canada, and finally an important post in the Canada Company's service. He died in Toronto in 1866 at the good old age of seventy-nine. Sir Matthew's mother was an Englishwoman, a native of Northumberland, Nancy Foy by name. Sir Matthew was born on 2nd October, 1822, and was the youngest child of his parents, and the only one of them born in Canada. He was named "Matthew Crooks," after an uncle of the late Hon. Adam Crooks. He received his education at a private school kept by a Mr. Randall, in Hamilton, and also at the Home District School, in Toronto, and in 1838 entered Upper Canada College, where he continued until 1840. In this year he met with an unfortunate accident at the island in front of the city of Toronto, while out shooting with two companions, one of whom accidentally shot him in the leg, shattering his ankle. The result was, the wounded limb had to be amputated, and he was doomed to crutches for the rest of his life. Through some defect in the surgical treatment he received he had to endure not only the loss of the leg, but the wound remained a continual source of pain and trouble to him until his dying day.

On his recovery from this accident he entered upon the study of the law in the office of Messrs. Campbell & Boulton, and in Hilary Term, 1849, he was called to the Bar of this Province. He commenced practice first as a partner of the late William Henry Boulton, his former master. Subsequently on Mr. Boulton retiring from practice he formed a partnership with the Hon. William Cayley, an English barrister, under the name of Cayley & Cameron. In 1859 Dr. McMichael became a member of the firm. On Mr. Cayley's retirement Mr. Cameron became the senior partner, and continued so until his elevation to the Bench as a *puisne* Judge of the Court of Queen's Bench, in 1878. He was appointed one of Her Majesty's Counsel in 1863, and was elected a Bencher in April, 1871.

While at the Bar he acquired a Provincial reputation as a forensic orator of the first class, and his services were eagerly sought in all parts of the Province. He was tall and slightly built, and of commanding presence, and though not gifted with a very musical voice, his force and keenness of invective, coupled with a thorough mastery of the law, made him very soon a formidable opponent, and in the early days of his career he found in the late Henry Eccles, John Hilyard Cameron, P. M. Vankoughnet and the present Chief Justice of Ontario, antagonists worthy of his utmost skill. Notwithstanding the infirmity he laboured under, owing to the accident to which we have referred, he was a most indomitable worker, and no client ever found his interests neglected in his hands. All that skill and learning and industry and eloquence could do, consistently with honour and

integrity, he might be sure would be done for him.

In 1859 he entered the arena of politics and was elected alderman for St. James' ward. In 1861 he offered himself as a candidate for the Mayoralty of Toronto, but failed to secure election. In the same year he was elected to the late Parliament of Canada as member for North Ontario, but at the general election which followed in that year he was defeated. In 1864 he was re-elected for that constituency, which he continued to represent until 1867. After Confederation he sought election to the Commons but was defeated, and was then elected to the Local House as member for East Toronto, a constituency in which he had for many years resided. He became a member of the late Sandfield Macdonald's Administration, in which he was at first Provincial Secretary, and afterwards Commissioner of Crown Lands.

In November, 1878, he was appointed a *puisne* judge of the Queen's Bench, and on the 13th May, 1884, he became Chief Justice of the Common Pleas on the removal of Chief Justice Wilson from that court to the Queen's Bench. In recognition of his distinguished services to the country, he, on the 5th of April last, received the honour of knighthood.

None who came in contact with the late Chief Justice could fail to be impressed with the simplicity of his manners, his entire freedom from *hauteur*, and his downright earnestness of purpose. He set for himself a high standard of honour, from which he never allowed himself to depart. He was not only admired and looked up to as a great lawyer, but he was beloved and esteemed because he was known to be in every transaction of life a thoroughly high-minded and upright gentleman. His devotion to duty, it is to be feared, has hastened his end. For the last few weeks his health had been seriously impaired through a succession of painful carbuncles, and he persisted in remaining at work, when his physicians think he should have been in bed. His disorder ultimately became complicated by an acute attack of inflammation of the bowels, to which he succumbed on the evening of the 25th June. His remains were interred on the 28th June in St. James' Cemetery, Toronto, according to the rites of the Anglican Church. A great concourse of professional, political and private friends attending to pay their last tribute of respect.

His name and memory will long be cherished with affection by the profession of this Province, and M. Berthon in the admirable portrait which he made of his departed friend, which hangs in Osgoode Hall, has handed his form and visage on to many succeeding generations of lawyers.

RECENT ENGLISH DECISIONS.

The *Law Reports* for May, in addition to the numbers referred to in our last issue, also comprise 12 App. Cas. pp. 181-283.

LEASE—JOINT TENANTS—COVENANT TO PAY RENT—LIABILITY OF EXECUTORS OF DECEASED TENANT DURING SOLE TENANCY OF SURVIVOR.

The first case to be noted is the Scotch appeal of *Burns* v. *Bryan*, 12 App. Cas. 184. The case arose upon the construction of a mining lease. The lease was for thirty-one years, and was granted to L and M, "and the survivor of them, but expressly excluding assigns and sub-tenants, whether legal or conventional." By the lease L and M bound themselves and their respective heirs, executors and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay the rent. There was also a provision that if either lessee became bankrupt the lessor should have the option of avoiding the lease. Shortly after the commencement of the lease

L became bankrupt, and M died, the lessor never exercised his option to determine the lease. It was held by the House of Lords (reversing the decision of the Court of Session) that by the terms of the covenant the lessees were jointly and severally liable for rent, irrespective of their interest, and that after M's death his representatives, though they had no interest as tenants, remained liable for rent during the currency of the lease.

WILL—POWER CREATED AFTER WILL—APPOINTMENT BY GENERAL BEQUEST—7 WM. IV. & 1 VICT. C. 26, SS. 23, 24, 27 (R. S. O. C. 106, SS. 25, 26, 29).

In *Airey* v. *Bower*, 12 App. Cas. 263, the House of Lords (affirming a decision of the Court of Appeal) held that when a testatrix who had a general power of appointment over the A property, by her will made in 1854, after specific devises and bequests, devised and bequeathed the residue of her estate to X, and afterwards, she, by a deed poll in 1855, appointed the A property upon such trusts as she, by deed or her last will, "should, from time to time, or at any time thereafter, direct or appoint," and, in default of appointment, in trust for Y; and the testatrix died in 1857 without having altered her will of 1854: that under the 7 Wm. IV. & 1 Vict. c. 26, ss. 23, 24, 27 (R. S. O. c. 106, ss. 25, 26, 29), the will operated as an exercise of the power reserved by the subsequent deed poll and passed the property to X. *Boyes* v. *Cook*, 14 Chy. D. 53, was approved.

PRINCIPAL AND AGENT—CONTRACT WITH AGENT FOR UNDISCLOSED PRINCIPAL—SET OFF AGAINST PRINCIPAL OF DEBT DUE BY AGENT—ESTOPPEL.

The only other case in this number of the appeal cases is *Cooke* v. *Eshelby*, 12 App. Cas. 271, which is an important decision on a point of commercial law. Livesy & Co., a firm of brokers, sold cotton to the appellant C. in their own names, but really on behalf of an undisclosed principal. The appellant knew that Livesy & Co. were in the habit of dealing both for principals, and on their own account, but had no belief, and made no inquiries, as to whether they made the contract as principals or agents. The principals brought the present action to recover the price of the cotton, and the appellant claimed the right to set off a debt due by Livesy & Co. to him; but the House of Lords (affirming the decision of the Court of Appeal) held that he was not entitled to do this. Lord Watson thus states the result of the cases:

> . . . In order to sustain the defence pleaded by the appellant, it is not enough to show that the agent sold the goods in his own name. It must be shown that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with Bowen, L. J., that it rests upon the doctrine of estoppel.

The *Law Reports* for June comprise 18 Q. B. D. pp. 657-827; 12 P. D. pp. 137-144; and 35 Chy. D. pp. 1-190.

POST-NUPTIAL SETTLEMENT—SOLVENCY OF SETTLOR AT DATE OF SETTLEMENT.

The bankruptcy case of *In re Lowndes*, 18 Q. B. D. 677, is deserving of notice. This was an application under the Bankruptcy Act, 1883, s. 47, to set aside a post nuptial settlement within ten years of its execution, and it appeared that if the life interest reserved to the settlor were taken into account, he was able to pay his debts at the date of the settlement, but that if it were not taken into account, he was insolvent; and it was held by Mathew and Cave, JJ., that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was therefore valid against the trustee in bankruptcy.

MASTER AND SERVANT — EMPLOYERS LIABILITY ACT 1880—"OTHERWISE ENGAGED IN MANUAL LABOUR"—DRIVER OF TRAM CAR—49 VICT. C. 28, S. 2, SS. 3 (O.).

Cook v. *The North Metropolitan Tramways Co.*, 18 Q. B. D. 683, was an action under the Employers Liability Act, 1880, brought by the driver of a tram car for injuries sustained by him through falling into a hole in the floor of a shed in which the defendants' cars were kept; and the question was whether the plaintiff was a "workman" within the meaning of the Act, which provided that the term should include any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, has entered into, or works under, a contract with an employer. The

court (A. L. Smith and Grantham, JJ.,) held that the plaintiff did not come under the definition of a workman. The court distinguished between the expressions "manual work" and "manual labour," and though conceding that a tram car driver was engaged in manual work, yet considered he could not be deemed to be engaged in manual labour.

MASTER AND SERVANT—DEFECT IN CONDITION OF WORKS—EMPLOYERS LIABILITY ACT, 1880—49 VICT., C. 28 S. 1 (O).

Thomas v. *Quartermaine*, 18 Q.B.D., 685, is another decision under the Employers Liability Act, 1880 (49 Vict. c. 28 [O].) in which the Court of Appeal affirm the decision of Wills and Grantham, JJ., 17 Q.B.D., 414, noted *ante*, vol. 22, p. 357. Lord Esher, M.R., however, dissented. In this case the plaintiff was employed in a cooling-room in the defendant's brewery; in the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced, or railed in. The plaintiff went along this passage to pull a board from under the boiling vat; the board, which was stuck fast, suddenly came away, so that the plaintiff fell back into the cooling vat and was scalded. Under this state of facts the court below had held that the employers were not liable, on the ground that there was no defect in the ways, works, or plant, of the brewery. As Bowen, L.J., observes, the decision is one of great importance to employers and workmen, and for this reason it may be useful to quote a passage from the judgment of Fry, L.J., at p. 700, which succinctly states the ground on which the majority of the court proceeded. After stating that independently of the Employers Liability Act, 1880, the plaintiff would have no cause of action, he proceeds to say:

> There arises the question which seemed to me to be that of the greatest difficulty in this case, viz.: has the plaintiff a right of action by force of the Act of 1880? The first section provides that when personal injury is caused to a workman by reason of any one of five things enumerated, the workman shall have the same right of compensation and remedies against his employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work. If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering the defendant's property by his invitation. Can such a person maintain an action in respect of an injury arising from a defect, of which defect and of the resulting damage he was as well informed as the defendant? I think not. To such a person it appears to me that the maxim *volenti non fit injuria* applies. . . . But again, s. 2, ss. 1, provides that a workman cannot maintain this action when arising from a defect in the ways or plant, unless the defect arose from, or had not been discovered or remedied, owing to the negligence of the employer, or of some person in his service as therein mentioned. Was there, then, in the present case any negligence, *i.e.*, any breach of duty which the defendant owed the plaintiff? In my opinion it must be determined by considering the real relation between the parties, *i.e.*, the relation of this particular master to this particular servant. The duty which a master owes to one servant may be quite different to that which he owes to another, it may vary with the knowledge, the experience, the skill, and the powers of the workman. In the present case I think that the master owed no duty in respect of the vat in question towards a workman who voluntarily continued to work on the property with a full knowledge of the defect and of the danger thence resulting.

It will thus be seen that the Court of Appeal proceeded upon a different ground to that adopted by the court below.

PRINCIPAL AND AGENT—LIABILITY OF AGENT—CUSTOM—EVIDENCE.

In *Pike* v. *Ongley*, 18 Q. B. D., 708, the Court of Appeal overruled the judgment of Day and Wills, JJ. The defendants, who were hop-brokers, gave to the plaintiffs a sold note, stating that they had sold to plaintiffs "for and on account of owner," 100 bales of hops. In an action for the non-delivery of the hops, the plaintiffs sought to make the defendants personally liable on the contract, and tendered evidence to show that by the custom of the hop trade, brokers who do not disclose the names of their principals at the time of making the contract are personally liable on it as principals, although they contracted as brokers for a principal. It was held by the Court of Appeal that this evidence was properly admissible, and was not in contradiction of the written contract.

PRINCIPAL AND AGENT — LIABILITY OF PRINCIPAL FOR REPRESENTATIONS OF AGENT.

British Mutual Banking Co. v. *Charnwood Forest Ry. Co.*, 18 Q.B.D., 714, is another decision on the law of principal and agent. In this case it was sought to make the defendants liable in respect of certain representations

made by their agent, who was the secretary of the defendant company, respecting the validity of certain debenture stock of the company. The representations were untrue, and were fraudulently made by the secretary for his own benefit. The jury found that the secretary was held out by the company as a person proper to answer inquiries respecting the stock on their behalf; but the Court of Appeal held (reversing the decision of Manisty and Mathew, JJ.) that the company was not liable in an action of deceit for the unauthorized and fraudulent act of the secretary, committed not for the general or special benefit of the company, but for his own private ends.

TAXATION—ASSESSMENT—RAILWAY COMPANY.

The short point decided in the *North and South Western Ry. Co.* v. *Assessment Committee of Brentford*, 18 Q.B.D., 740, by the Court of Appeal, was that where a line of railway is leased by three different railway companies, the line, for the purposes of taxation, is to be assessed, not as being an integral part of each of the lines of the three companies leasing it, but on the basis of the rent which a tenant from year to year might reasonably be expected to give for it as an independent line.

EQUITABLE MORTGAGE—ORAL PROMISE TO GIVE SECURITY—STATUTE OF FRAUDS—PART PERFORMANCE.

Ex parte Broderick, 18 Q. B. B. 766, is a bankruptcy decision involving a question of law of general interest. The bankrupt being indebted to a company made an oral promise to the directors to give them security for the debt when required. He was then entitled to a one-fifth reversionary interest in a farm of which his mother, the tenant for life, held the deeds. The mother subsequently died, and the title deeds came into the possession of the respondent who was manager of the company, and was also entitled to one-fifth of the property. The respondent told the bankrupt that he had the deeds, and that he held the bankrupt's one-fifth for the company. But the Court of Appeal held (affirming the decision of Cave and Wills, JJ.), 18 Q. B. D. 380, that the company had not a valid equitable mortgage of the bankrupt's share in the farm, because there was no memorandum in writing to satisfy the Statute of Frauds, and the conversation that took place between the bankrupt and the respondent as to the custody of the title deeds, not being followed by any act which altered the legal position of the parties, was not such a part performance of the oral promise to give security as would exclude the operation of the statute.

ACTIO PERSONALIS MORITUR CUM PERSONA—SLANDER OF TITLE—DEATH OF PLAINTIFF—CONTINUANCE OF ACTION.

Hatchard v. *Mege*, 18 Q. B. D., 771, was an action for publishing an alleged false and malicious statement respecting the plaintiff's trade, calculated to injure the plaintiff's right of property in a trade mark; the plaintiff died pending the action, and an order was made to continue the action in the name of his executrix. At the trial Lord Coleridge, C.J., nonsuited the plaintiff on the ground that the cause of action did not survive; but the Divisional Court (Day and Wills, JJ.) held that the injury complained of being one not merely to the person but to the estate of the deceased, in so far as the claim was in the nature of slander of title it did survive in favour of the executrix, who would be entitled to recover on proof of special damage, and a new trial was ordered, limited to the latter cause of action.

STATUTE OF LIMITATIONS—EJECTMENT—POSSESSION OF TENANTS—RECEIPT OF RENTS BY AGENT—RATIFICATION.

The keenly contested case of *Lyell* v. *Kennedy*, 18 Q. B. D. 796, has at last reached the Court of Appeal on the merits. The facts of the case were somewhat peculiar. The defendant had been for many years the agent of Ann Duncan, a former owner of the property in question, and collected the rents of it for her. In 1867 Ann Duncan died intestate, and it was unknown who were her heirs-at-law. The defendant, after her death, continued to receive the rents, and carried them to an account which he had opened in the name of "the executors of Laurence Buchan." The defendant was one of the executors of Laurence Buchan's estate, and it was under the latter's will that Ann Duncan became entitled to the property. It further appeared that the defendant had frequently stated, orally, and in writing to the plaintiff (before he acquired the title of the heirs of Ann Duncan), that he was acting on behalf of the true heir-at-law of

Duncan, whoever he might be; and he stated that the property would be delivered up to the rightful owners as soon as it should be ascertained who they were. The plaintiff subsequently in 1880 procured an assignment of the interests of three ladies who were the sole heiresses-at-law of Ann Duncan—one of them was a married woman whose husband died in 1877, the other two were unmarried. The present action was commenced on 4th January, 1881. Stephen, J., before whom the action was tried, considered that the defendant had constituted himself the agent for the heir-at-law, and could not rely on the Statute of Limitations. On the appeal from this decision the defendant admitted that as to the share of the married woman the plaintiff was entitled to succeed, as by reason of her coverture the Statute of Limitations had not run against her. But as to the other two shares it was contended that the statute was a bar, and of this opinion was the Court of Appeal. The Court of Appeal held that the statute as to these two shares commenced to run in 1868 at the expiration of one year from Ann Duncan's death, that there had been no adoption or ratification of the acts of the defendant within the statutory period, and that no ratification after the statutory period could have the effect of reviving a title which, by force of the statute, had been extinguished.

PRINCIPAL AND AGENT—SECRETARY OF COMPANY, REPRESENTATION BY—ESTOPPEL.

The case of *Barnett* v. *The South London Tramway Co.*, 18 Q. B. D. 815, shows the care that is necessary to be exercised in acting on representations made by the secretary of a company. In this case the defendant company employed contractors to execute certain works. By the contract the defendants had a right to retain a percentage of the amounts for which their engineer had from time to time certified, had been earned on account of the price, until the completion of the work. The contractors having applied to the plaintiffs for an advance upon the security of the moneys retained by the defendants; the defendants' secretary, in answer to the plaintiffs' inquiries, erroneously represented that there was a certain amount of money retained in the defendants' hands which would be payable on completion of the works, whereas, in fact, it was not so. The plaintiffs thereupon advanced money to the contractors on the security of an assignment of the fund supposed to be in the defendants' hands. There being no evidence to show that the secretary had any authority to make the representations he did, it was held by the Court of Appeal (affirming the judgment of Field, J.) that it was not within the scope of the secretary's authority to make such representations, and therefore, that in an action by the plaintiffs as assignees to recover the fund in question, the defendants were not estopped from denying that the money was due.

Lord Esher, M.R., says at p. 817:

A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent any thing at all; nor can any one assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts.

PRACTICE — WITHDRAWAL OF JUROR — BREACH BY ONE PARTY, OF COMPROMISE—RETRIAL OF ACTION.

The concluding case in the Queen's Bench Division is *Thomas* v. *Exeter Flying Post Co.*, 18 Q.B.D. 822, and is a decision of the Divisional Court (Day and Wills, JJ.) on an interesting point of practice. The action was against a newspaper proprietor for libel, and at the trial it was agreed that a juror should be withdrawn, and an apology should be made in court by defendants' counsel, and published in defendants' paper. The juror was accordingly withdrawn and the apology offered in court, and on the following day the defendant published an account of the proceedings at the trial and the apology, but in another part of the paper a leading article appeared explaining away the apology; thereupon the plaintiff applied to the judge to have the action retried, which being done, and a verdict of £100 having been obtained—the defendant not having appeared at such retrial personally, or by counsel—a motion was then made to set aside the verdict and for a new trial, the defendant's counsel contending that the withdrawal of the juror put an end to the action; and that the publication of the further libel was the subject of a fresh action, and was not a breach of any undertaking by the defendants; but the court dismissed the motion.

Recent English Decisions.

WILL—REVOCATION—ERASURE OF SIGNATURES—WILLS ACT, 7 W.IV. & 1 VICT., C. 26, S. 20 (R.S.O. c. 106, s. 22.)

The only case in the Probate Division to which we think it necessary to draw attention is *In re Morton*, 12 P. D. 141. In this case a will, which after execution had remained in the custody of the testatrix, was found in her repositories after her death, with her own signature and the signatures of the attesting witnesses scratched out as with a knife; and it was held that there had been a revocation of the will within the requirements of s. 20 of the Wills Act (R. S. O. c. 106, s. 22).

SEPARATE ESTATE—RESTRAINT ON ANTICIPATION—PAYMENT TO MARRIED WOMAN UNDER ORDER SUBSEQUENTLY REVERSED — MARRIED WOMAN'S PROPERTY ACT, 1882.

Turning now to the cases in the Chancery Division, *In re Dixon*, *Dixon* v. *Smith*, 35 Chy. D. 4, first claims attention. In this case a female infant being entitled to a residuary share of personalty contingently on her attaining twenty-one, at the age of sixteen married in the year 1879, having first executed articles for the settlement of all property to which she might become entitled, but the sanction of the court under the Infants Settlement Act was not applied for. Under these articles she took a life interest in the fund, with a restraint on anticipation. On the 9th November, 1884, she attained twenty-one, and in September, 1885, £9,000 being the bulk of her share, was paid to her on her separate receipt under an order of Bacon, V.-C., made under the authority of *Baynton* v. *Collins*, 27 Chy. D. 604, on the ground that the settlement was not binding on her. The trustees of the settlement appealed, and the Court of Appeal held, in accordance with *Reid* v. *Reid*, 31 Chy. D. 402, that she was not so entitled, and that the fund was subject to the trusts of the settlement, and that the sum paid to the married woman ought to be refunded. She refunded £7,100, but having spent the remaining £1,900 was unable to refund it. Subsequently, a sum of £1,648 9s. 7*d.* for arrears of income on the fund, part of which accrued before the married woman attained twenty-one, was paid to the trustees of the settlement, and they applied to the court for directions as to its application. The married woman claimed to be paid the whole arrears, on the ground that under *Pike* v. *Fitzgibbon*, 17 Chy. D. 454, the restraint on anticipation prevented the application of the arrears of income in reduction of the £1,900 of capital unrefunded by her. But the Court of Appeal held that so much of the arrears as accrued before the married woman attained twenty-one was part of the capital of the fund subject to the settlement, and that so much of the income as accrued between the date of her attaining twenty-one and the date of the order of Bacon, V.-C., should be retained by the trustees to make good the £1,900 unrefunded, and that the balance only should be paid to the married woman. The Court of Appeal held *Pike* v. *Fitzgibbon* not to apply, as there the liability sought to be enforced arose on contract.

INFANT—MARRIED WOMAN—POST NUPTIAL SETTLEMENT —WARD OF COURT—INFANTS SETTLEMENT ACT (R. S. O. c. 40, s. 85).

Buckmaster v. *Buckmaster*, 35 Chy. D. 21, throws a perhaps somewhat unexpected light on the effect of the Infants Settlement Act (R. S. O. c. 40, s. 85). In this case a young lady aged eighteen, being a ward of court, contracted marriage without the leave of the court, and subsequently an order was made, directing an inquiry whether there had been a valid marriage, and if so, what the infant's fortune was, and what would be a proper settlement; and a settlement of the infant's fortune, which consisted of a reversionary interest in personalty, was thereupon executed with the approval of the court. During the coverture the tenant for life relinquished her life estate in one-fifth of the fund, which was paid over to the trustees of the settlement. Subsequently, on account of the husband's misconduct, a divorce was granted. After this the tenant for life died, and the question arose whether the marriage settlement was binding, the property settled having been a mere reversionary interest. Bacon, V.-C., held that the settlement was binding, either under the inherent jurisdiction of the court over its wards, or under the provisions of the Infants Settlement Act, notwithstanding that the reversionary interest had not been reduced into possession during coverture. But the Court of Appeal unanimously reversed this decision, holding that the court had no inherent power to compel its wards to execute settlements of

their property, and that the Infants Settlement Act only removed the disability of infancy, but did not remove the disability of coverture, and therefore because the settlement in question could not have been validly made by an adult married woman, neither could it be validly made by an infant married woman, and the payment over to the trustees of the part of the fund in which the tenant for life had relinquished her life estate, though it has the effect of subjecting this part of the fund to the terms of the settlement, yet it was held it had no effect as regards the rest of the fund. While admitting therefore that the settlement, if ante-nuptial, would have been binding on the married woman, the court held that being post nuptial the disability of coverture prevented its being operative to any greater extent than it would have been had the lady been of full age. The principles enunciated in this case, however, do not appear to us to be reconcileable with what was done in the case of *Re Dixon*, above referred to.

ECCLESIASTICAL BENEFICE—RESIGNATION—REVOCATION BEFORE ACCEPTANCE.

Nearly fifty pages of the reports are taken up with the discussion of a point of ecclesiastical law in *Reichel* v. *Bishop of Oxford*, 35 Chy. D. 48. The plaintiff, a beneficed clergyman, had been publicly accused of immorality, and on being required by his bishop to clear his character, he indicted his accuser for libel, but failed to obtain a conviction. In May, 1886, his bishop intimated to him that he expected him to resign his benefice without delay, and after some negotiation the plaintiff agreed to do so, on the understanding that his resignation would not be formally accepted by the Bishop until 1st October following, and that in the meantime the plaintiff should have leave of absence, making due provision for the duties of the parish. The 1st October being named in order that the plaintiff might not be deprived of the emoluments he had earned. The plaintiff then executed a formal resignation in the presence of two witnesses, which was delivered to the bishop. Before the 1st October the plaintiff executed an instrument purporting to revoke this resignation, and the present action was brought to obtain a declaration that the resignation was invalid, or at all events that it had been duly revoked. On behalf of the plaintiff it was contended that the resignation was invalid because it was not made to the bishop in person or executed in presence of a notary; and because it was executed subject to a condition that it should not come into operation until a future date; and because it was withdrawn before acceptance. But the Court of Appeal (affirming North, J.) overruled all these objections and held the resignation to be valid and irrevocable.

MARRIED WOMAN—SEPARATE ESTATE—SIMPLE CONTRACT DEBT—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16).

Re Hastings, *Hallett* v. *Hastings*, 35 Chy. D. 94, disposes of a question of some importance affecting the law of married women. In 1875 a married woman borrowed money from her husband, upon a parol agreement to repay it with interest. She died in 1884, without having paid anything on account, or given any acknowledgment in writing of her liability to pay the debt. After her death her husband claimed repayment out of her estate. But it was held by the Court of Appeal (affirming Kay, J.) that by analogy to the Statute of Limitations the claim was barred.

MORTGAGE—AFTER ACQUIRED PROPERTY—UNCERTAINTY.

In re Clarke, *Coombe* v. *Carter*, 35 Chy. D. 109, the question was whether or not an assignment by way of mortgage of all the mortgagor's household goods and farming stock, and "also all moneys of or to which he then was, or might during that security become, entitled under any settlement, will, or other document, either in his own right, or as the devisee or legatee or next of kin of any person;" and also all real and personal property "of, in, or to which the mortgagor was, or during that security should become, beneficially seized, possessed, entitled, or interested for any vested, contingent, or possible estate or interest," was sufficient to vest in the mortgagee a share of a testator's residuary estate to which the mortgagor became entitled subsequently to the date of the mortgage. It was contended by the mortgagor that the description was too vague and uncertain, but it was held by Kay, J., that the mortgage was sufficient in equity to pass the estate in question.

RECEIVER—MORTGAGOR AND MORTGAGEE—MORTGAGOR IN POSSESSION—OCCUPATION RENT.

The short point determined by Chitty, J., in *Yorkshire Banking Company* v. *Mullan*, 35 Chy. D. 125, was this: that when in a mortgage action a receiver is appointed, and the mortgagor is in possession, the latter is not liable for an occupation rent from the date of the appointment of the receiver, but only from the date of the receiver demanding rent, the receivership order containing no order that the mortgagor should deliver up possession, or pay rent.

POWER OF APPOINTMENT — EXCESSIVE EXERCISE OF POWER—VALIDITY OF APPOINTMENT, IN DEFAULT OF EXERCISE OF DELEGATED POWER.

In *Williamson* v. *Farwell*, 35 Chy. D. 128, it was held by North, J., when the donee of a power of appointment among his own children appointed to his son for life with remainder to his son's children as he should appoint, and in default of such an appointment to the son absolutely, and the son died without exercising the power thus delegated to him, that the ultimate limitation in favour of the son was valid and took effect notwithstanding the invalid delegation of the power to him.

AGREEMENT IN RESTRAINT OF TRADE—INJUNCTION—PARTIAL ENFORCEMENT.

Baines v. *Geary*, 35 Chy. D. 154, was an application for an interim injunction to restrain the defendant from violating an agreement, made by him on entering the plaintiff's service as a milk carrier, not to serve or interfere with any customer belonging to the master, his successors or assigns. It was contended that the agreement was wider than was reasonable, and therefore invalid. But North, J., held that though the argument might be wide enough to include all the persons who might at any time be customers of the plaintiff, still it was divisible, and might be enforced to the extent to which it was valid, and he granted the injunction, but limited to such persons as had become customers of the plaintiff before the defendant left his employment.

PRACTICE — WRIT OF SUMMONS — DEFAULT OF APPEARANCE—STATEMENT OF CLAIM.

In *Gee* v. *Bell*, 35 Chy. D. 160, it was held by North, J., that where a plaintiff, in default of appearance, delivers a statement of claim by filing it with the proper officer, he cannot obtain judgment in default of appearance for more than he has claimed by his writ. If the plaintiff in such a case desire to claim further relief than that claimed by the indorsement on the writ, it would seem that he must amend and re-serve his writ.

PRACTICE—ACTION FOR ACCOUNT—PAYMENT INTO COURT BEFORE TRIAL.

Wanklyn v. *Wilson*, 35 Chy. D. 180, was an interlocutory application to compel the defendant to pay into court before trial, moneys alleged to be in his hands—the action being one for an account—and it was held by Stirling, J., that an account having been rendered, and the court having before it the parties to the account, and evidence as to the items in dispute, that such sum might be ordered to be paid into court before trial, as the court, in the exercise of its discretion, should consider would be found due to the plaintiff on the taking of the account.

PRACTICE—SPECIFIC PERFORMANCE—DEFENDANT NOT APPEARING—RESCISSION OF CONTRACT—JUDGMENT.

The only remaining case to be noted is *Stone* v. *Smith*, 35 Chy. D. 188, in which it was held by Kekewich, J., that in a vendor's action for specific performance of a contract to purchase leaseholds, in which the defendant by his statement of defence admitted that he was unwilling to complete the contract, and did not appear at the trial: the plaintiff was not entitled to an immediate judgment, rescinding the contract and forfeiting the deposit, but only to the usual judgment for specific performance.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Boyd, C.] [May 26.

RE LEWIS AND THORNE.

Writs against lands—Sale by trustees—Application of purchase money—Vendor and purchaser.

Where, on a vendor and purchaser application, it appeared that two trustees under the will of F. L. had, as such, contracted to sell certain lands to H. D., and that under the provisions of the said will the vendors were directed to sell the said lands, and, after payment of funeral expenses and debts, divide the balance of the proceeds among certain of the children of the testatrix, amongst whom was one D. V. L., and that there were certain executions against the lands of D. V. L. in the hands of the sheriff issued upon certain judgments obtained against him, whereupon the purchaser objected that the said executions were a charge and incumbrance on the interest in the said lands contracted to be sold of the said D. V. L., and that the vendors were bound to discharge the said executions in order to convey the lands to him, and the vendors submitted on the contrary, and that they could make a good title free from incumbrance without payment of the said executions, and that the purchaser was not bound to see to the application of the purchase-money,

Held, that the writs of execution did not interfere with the right of the trustees to sell so as to carry out the directions of the will, and that as a matter of conveyancing, they did not derogate from the right of trustees to convey the estate indefectibly, and that the purchaser was not required to see to the application of the purchase-money in view of R. S. O. c. 107, sec. 7.

Held, also, as to executions against lands coming in after the contract to sell, they could not affect the devolution of title as between vendor and purchaser.

Boyd, C.] [May 30.

RE BOLT AND IRON COMPANY.

Corporations—Managing director—Remuneration—Breach of trust—Set off—Winding up—Assignment.

By-law 17 of the company provided that "the directors and managing director should be paid for their services such sums as the company may from time to time determine at a general meeting." The only provision made at a general meeting was that which was approved on January 27th, 1883, in these words: "The salary of the managing director was fixed until the 31st day of October next, as at the rate of $4,000 per annum." Beyond October 31st the company had not exercised its discretion under the by-law. L., the managing-director, sought to recover for services rendered as such subsequent to October 31st, 1883.

Held, that he could not do so.

The position of L. as managing-director rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company who got paid for the work he did. The rules as to hiring and notice between master and servant were therefore not applicable, and the measure of the rights of the salaried managing-director had to be settled by what was provided in that behalf by the charter and by-laws of the company, and here there was no provision for remuneration after October 31st, 1883.

L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services after October 31st, 1883.

Held, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on breach of trust, recoverable by the liquidator, and as to which no set-off was permissible against any debt due by the company to L. L. was bound to replace the money without any deduction before he could get any dividend from the assets of the company in respect to any other claims he had against it.

Held, also, that the fact that L. had assigned his said claim against the company to his wife, after the winding up order had been acted on, made no difference, since any such

assignment would be subject to all the equities against such claim, and against the assignor as a director and trustee of the company's funds in the proceedings under the winding up order.

Bain, Q.C., for the appeal.

Falconbridge, Q.C., contra.

Rose, J.] [June 1.
Chy. Div. Ct.] [June 29.

MCPHAIL v. MCINTOSH.

Will—Construction—General intention in favour of a class—Particular intention in favour of individuals.

Action for recovery of land.

It appeared that A. McP. in 1826 bought the north half of lot 26, and lived on lot 25, adjoining, until his death in 1841.

J. McP., his son, lived on lot 26 from 1826 till October, 1878, when he died.

By will in 1841 A. McP. devised to J. McP. lot 26, but added, "he is not to sell or dispose of the said lands nor any timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children according to the discretion of my executors, that is to say after his own death."

In February, 1869. J. McP. conveyed the north half of lot 26 to the defendant.

The plaintiff, a son of J. McP., claimed to be entitled under the above will.

The executrix of A. McP. made no selection as to who was the most deserving of his children on which the land should devolve.

Held, that the plaintiff was entitled to judgment, for that J. McP. only took a life estate, and though no selection had been made among the children of A. McP. the court would carry out the general intention in favour of the class by holding that the estate descended on the twelve children of J. McP., and that the plaintiff, having purchased or obtained a conveyance of six-twelfths of the estate, was entitled to seven out of the twelve shares of it.

Leitch, for the plaintiff.

J. Maclennan, Q.C., for the defendant.

Ferguson, J.]

THE ONTARIO AND SAULT STE. MARIE RY. CO. v. THE CANADIAN PACIFIC RY. CO.

Railway Acts—Special Act—General Act, construction of.

Where a railway company is incorporated by a special Act, and there are provisions in the special Act, as well as the general Railway Act, on the same subject, which are inconsistent; if the special Act gives in itself a complete rule on the subject, the expression of that rule amounts to an exception of the subject-matter of the rule out of the general Act. When the rule given by the special Act, applies only to a portion of the subject, the special Act may apply to one portion, and the general Act to another.

The probable intention of the legislature is important in considering a matter of that character.

S. H. Blake, Q.C., and *Cassels*, Q.C., for the plaintiffs.

C. Robinson, Q.C., and *Moss*, Q.C., for the defendants.

Boyd, C.] [May 27.

BANK OF COMMERCE v. NORTHWOOD.

Bills and notes—Agreement with maker—Release of indorser.

The holder of certain promissory notes entered into an agreement with the maker and certain indorsers to extend the time for the payment of the notes without the consent or knowledge of the defendant, who was a subsequent indorser of the same notes; but the agreement expressly reserved all rights and remedies against the sureties.

Held, that this being so, the defendant as surety was not discharged. And also that the reservation of the surety's rights against those for whom he was surety (that is to say, the maker and the prior indorsers) was necessarily involved in the reservation of the rights and remedies of the holder against him as surety.

The agreement further provided for renewal for six months, from time to time, till the notes were paid; but these renewals were assented to by the defendant, who joined therein and was not prejudiced thereby.

without, a jury, as he may think best, and his discretion will not be interfered with by a Divisional Court.

Read, Q.C., for the defendant.

Shepley, for the plaintiff.

Chy. Div. Ct.] [June 22.

FURLONG v. REID.

Notice of motion, grounds of—Non-direction—Amendment.

A notice of motion to a Divisional Court against the verdict and judgment at the trial, on the ground of non-direction, should show how, and in what way, there was non-direction. The Court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so, where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendants would have operated against a meritorious claim of the plaintiff. *Piper* v. *Midland Ry. Co.*, 18 Q. B. D. 244, followed.

Moss, Q.C., and *Parkes*, for the defendant.

E. Martin, Q.C., and *Beazley*, for the plaintiff.

CIRCUIT LISTS.

AUTUMN ASSIZES, 1887.

The Courts of Oyer and Terminer and General Gaol Delivery Delivery and of Assize and Nisi Prius in and for the several counties of the Province of Ontario, will be held as follows:

The Hon. CHIEF JUSTICE CAMERON.

BARRIE	Monday	12th September.
OWEN SOUND	Monday	26th September.
OTTAWA	Monday	3rd October.
PEMBROKE	Monday	17th October.
L'ORIGNAL	Monday	24th October.
PERTH	Thursday	27th October.
LINDSAY	Monday	7th November.
PETERBOROUGH	Monday	14th November.

The Hon. Mr. JUSTICE ARMOUR.

HAMILTON	Monday	12th September.
STRATFORD	Tuesday	20th September.
GUELPH	Monday	26th September.
BERLIN	Monday	3rd October.
BRANTFORD	Thursday	6th October.
SIMCOE	Tuesday	11th October.
CAYUGA	Thursday	13th October.
WELLAND	Monday	17th October.

The Hon. Mr. JUSTICE ROSE.

LONDON	Monday	12th September.
ST. THOMAS	Monday	26th September.
CHATHAM	Monday	3rd October.
SANDWICH	Monday	10th October.
SARNIA	Monday	17th October.
GODERICH	Monday	24th October.
WALKERTON	Monday	31st October.
WOODSTOCK	Monday	7th November.

The Hon. Mr. JUSTICE O'CONNOR.

WHITBY	Monday	12th September.
NAPANEE	Monday	19th September.
PICTON	Thursday	22nd September.
BELLEVILLE	Monday	26th September.
KINGSTON	Monday	10th October.
BROCKVILLE	Monday	17th October.
CORNWALL	Monday	24th October.
COBOURG	Monday	31st October.

HOME CIRCUIT.

The Hon. Mr. JUSTICE GALT.

TORONTO—Civil Ct.	Monday	12th September.
" Crim. Ct.	Monday	3rd October.
ST. CATHARINES	Monday	24th October.
ORANGEVILLE	Monday	31st October.
MILTON	Monday	7th November.
BRAMPTON	Monday	14th November.

N.B.—There shall be at every Nisi Prius Court a Jury List and a non-Jury List. The former shall be first disposed of, and the latter not taken till after the dismissal of the Jury Panel, unless otherwise ordered.

A Judge will remain in Toronto to hold the Sittings of the Court each week, and for the transaction of the business in Chambers.

Of which all Sheriffs, Magistrates, Gaolers, and other Peace Officers are required to take notice.

A. GRANT,
Clerk of the Supreme Court, Ontario

Dated 4th June, 1877.

AUTUMN CIRCUITS, 1887.

CHANCERY DIVISION.

The Hon. Mr. JUSTICE ROBERTSON.

TORONTO	Monday	7th November.

The Hon. THE CHANCELLOR.

KINGSTON	Monday	12th September.
BROCKVILLE	Friday	16th September.
CORNWALL	Tuesday	20th September.
COBOURG	Friday	30th September.
BELLEVILLE	Monday	24th October.
OTTAWA	Wednesday	2nd November.

The Hon. Mr. JUSTICE PROUDFOOT.

CHATHAM	Monday	12th September.
SANDWICH	Friday	16th September.
SARNIA	Tuesday	20th September.
GODERICH	Monday	26th September.
WALKERTON	Friday	30th September.
LONDON	Monday	10th October.
ST. THOMAS	Monday	17th October.

The Hon. Mr. JUSTICE FERGUSON.

BRANTFORD	Monday	12th September.
SIMCOE	Friday	16th September.
ST. CATHARINES	Monday	26th September.
HAMILTON	Thursday	20th October.
OWEN SOUND	Monday	31st October.
GUELPH	Monday	7th November.

The Hon. Mr. JUSTICE ROBERTSON.

LINDSAY	Wednesday	21st September.
PETERBOROUGH	Tuesday	27th September.
WOODSTOCK	Monday	3rd October.
BARRIE	Monday	10th October.
STRATFORD	Tuesday	18th October.
WHITBY	Monday	24th October.

CORRESPONDENCE.

To the Editor of the CANADA LAW JOURNAL:

DEAR SIR,—I inclose a pamphlet published by the Irish Loyal and Patriotic Union which a friend has recently sent to me from England, and which you may consider of sufficient interest to your readers to publish in the pages of your journal.

Yours faithfully, A. H. F. LEFROY.

June 23, 1887.

AN IRISH TENANT'S PRIVILEGES.

The privileges of Irish tenant farmers are of gradual growth, and date from various Acts of Parliament. They have, however, in recent years, been largely extended by three great measures:—(1) the Land Act of 1870; (2) the Land Law Act, 1881; and (3) the Land Purchase Act, 1885. It will, then, be convenient to consider these various privileges in chronological order.

I.—PRIVILEGES ACQUIRED PRIOR TO 1870.

No tenant can be evicted for non-payment of rent *unless one year's rent is in arrears.* (Landlord and Tenant Act, 1860, sect. 52.)

Even when evicted for non-payment of rent—

A tenant can *recover possession* within six months by payment of the amount due, and in that case the landlord *must pay* to the tenant the amount of any profit he could have made out of the lands while the tenant was out of possession. [11 Anne, c. 2, sect. 2; 8 Geo. I., c. 2, sect. 4; Act of 1860 (23 & 24 Vict. c. 154), sect. 70.]

The landlord must pay *half* the poors-rate if the Government valuation of a holding is £4 or upwards. (Poor Relief Act, 1843, sect. 1.)

The landlord must pay the *entire* poors-rate if the Government valuation is under £4. (Poor Relief Acts, 1838, sect. 74; 1849, sect. 11.)

II.—PRIVILEGES UNDER THE ACT OF 1870.

A yearly tenant who is disturbed in his holding by the act of the landlord, for causes other than non-payment of rent, and the Government valuation of whose holding does not exceed £100 per annum, must be paid by his landlord not only—

(*a*) Full compensation for all improvements made by himself or his predecessors, such as unexhausted manures, permanent buildings, and reclamation of waste lands; *but also as*

(*b*) Compensation for disturbance, a sum of money which may amount to seven years' rent. (Land Act, 1870, sects. 1, 2 and 3.)

NOTE.—Under the Act of 1881, the landlord's power of disturbance is practically abolished.

A yearly tenant, even when evicted for non-payment of rent, must be paid by his landlord—

(*a*) Compensation for all improvements, such as unexhausted manures, permanent buildings, and reclamation of waste land. (Sect. 4.)

And when his rent does not exceed £15 he must be paid in addition—

(*b*) A sum of money which may amount to seven years' rent, if the court decides that the rent is exorbitant. (Sects. 3 and 9.)

NOTE.—Until the contrary is proved, the improvements are presumed to have been made by the tenants. (Sect. 5.) The tenant can make his claim for compensation immediately on notice to quit being served, and cannot be evicted until the compensation is paid. (Sects. 16 and 21.)

A yearly tenant, even when voluntarily surrendering his farm, must either be paid by landlord—

(*a*) Compensation for all his improvements; or be

(*b*) Permitted to sell his improvements to an incoming tenant. (Sect. 4.)

In all new tenancies—

The landlord must pay *half* the county or Grand Jury Cess, if the valuation is £4 or upwards.

The landlord must pay the *entire* county or Grand Jury Cess, if the value does not exceed £4. (Land Act, 1870, sects. 65 and 66.)

III.—PRIVILEGES UNDER THE ACT OF 1881.

The Act of 1870 mainly conferred two advantages on evicted tenants—

(*a*) Full payment for all improvements;

(*b*) Compensation for disturbance.

The Act of 1881 gave three additional privileges to those who avail themselves of them:

1. *Fixity of Tenure*—By which the tenant remains in possession of his land *for ever*, subject to periodical revision of his rent. (Land Act, 1881, sect. 8.)

NOTE.—If a tenant has not had a fair rent fixed, and his landlord proceeds to evict him for non-payment of rent, he can apply to the court to fix the fair rent; and meantime the eviction proceedings will be restrained by the court. (Land Act, 1881, sect. 13.)

2. *Fair Rent*—By which any yearly tenant may apply to the Land Commission Court (the judges of which were appointed under Mr. Gladstone's administration) to fix the fair rent of his holding. The application is referred to three persons, one

of whom is a lawyer, and the other two inspect and value the farm. This rent can never again be raised by the landlord. (Land Act, 1881, sect. 8.)

3. *Free Sale*—By which every yearly tenant may, whether he has had a fair rent fixed or not, sell his tenancy to the highest bidder whenever he desires to leave. (Land Act, 1881, sect. 1.)

NOTE.—There is no practical limit to the price he may sell for, and twenty times the amount of the annual rent has frequently been obtained in every Province in Ireland.

Even if a tenant be evicted, he has the right either to redeem at any time within six months, or to sell his tenancy within the same period to a purchaser who can likewise redeem, and thus acquire all the privileges of the tenant. (Land Act, 1881, sect. 13.)

IV. PRIVILEGES UNDER THE LAND PURCHASE ACT OF 1885.

If a tenant wishes to buy his holding, and arranges with his landlord as to terms, he can change his position from that of a perpetual rent payer into that of the payer of an annuity terminable at the end of forty-nine years, the Government supplying him with the entire purchase-money, to be repaid during those forty-nine years at four per cent. This annual payment of £4 for every £100 borrowed covers both principal and interest. Thus if a tenant already paying a statutory rent of £50 agrees to buy from his landlord at twenty years' purchase (or £1000), the Government will lend him the money, his rent will at once cease, and he will pay, not £50, but £40 yearly, for forty-nine years, and then become the owner of his holding, free of rent. It is hardly necessary to point out that, as these forty-nine years of payment roll by, the interest of the tenant in his holding increases rapidly in value. (Land Purchase Act, 1885, sects. 2, 3 and 4.)

It must also be remembered that the privileges cited in this leaflet, though the most important, are by no means the entire of the legal privileges of the Irish tenant.

Thus it will be seen (to use the words of Mr. Chamberlain), that "The Irish tenant is in a position which is more favourable than that of any agricultural tenant throughout the whole of Europe. I will say in any civilized country on the face of the globe. . . . There are thousands and tens of thousands of tenants throughout Scotland and England who would receive as an inestimable boon those opportunities which the Irish tenant so scornfully rejects."—*Speech at Hawick, Scotsman*, January 24th, 1887.

In considering these privileges, it must be borne in mind that those conferred by the Act of 1881 (which broke down old contracts of tenancy, and even prohibited tenants of holdings valued under £150 yearly from contracting themselves out of the Act) could not have been given under the constitution of the United States.*

* See Federal Constitution, Article I., sect. x. i.—"No State shall pass any law impairing the obligation of contracts."

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee 10r Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

Law Society of Upper Canada.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. AUGUST 1, 1887. No. 14.

DIARY FOR AUGUST.

1. Mon .....Slavery abolished in British West India Islands, 1838.
6. Sat.....Thomas Scott, 4th C.J. of Q.B., 1860.
7. Sun.....*9th Sunday after Trinity.*
11. Thur.....Battle of Lake Champlain, 1814.
14. Sun. .....*10th Sunday after Trinity.*
16. Tues.....Primary Examination of students and articled clerks, university graduates and matriculants seeking admission to Law Society to present papers.
20. Sat.....Last day for filing papers with secretary Law Society, before call or admission.
21. Sun.....*11th Sunday after Trinity.*
22. Mon.....Ontario Judicature Act came into force, 1881.
23. Tues.....First Intermediate Examination.
24. Wed.....Last day of setting down for Div. Ct. Chan. Div.
25. Thur.....Second Intermediate Examination.
28. Sun.....*12th Sunday after Trinity.*
30. Tues.....Solicitors' examination.
31. Wed.....Barristers' examination.

TORONTO, AUGUST 1, 1887.

CANADIANS are not the only people who are suffering from a surfeit of laws. Our contemporary, the Chicago *Legal News*, says that the Illinois Legislature has during its session of 1887 made more changes in the laws than any Legislature for fifteen years, and that it will take the Courts of Illinois twenty years to settle the law so as to place it in as good a condition as it was in January last.

THE sudden death of Mr. F. A. Lewin, at the early age of forty-five, has removed from the field of legal literature the latest editor of Lewin on Trusts It appears that Mr. Lewin suddenly dropped dead while taking part in a jubilee celebration in a field near Kensington Palace. His death was due to heart disease consequent on over-exertion and excitement.

RUMOUR has, as usual, been busy with the names of possible successors to the late Sir Matthew Cameron, and of other judges whose resignation is shortly expected to take place; and, as usual, the vaticinations are based largely upon the assumption that the appointment will be made according to the dictates of political expediency. It is to be regretted that there is too much foundation for the belief that judgeships are looked upon by the authorities at Ottawa as fitting rewards for mere political services, and that the interests of the public are but a secondary consideration.

Were the public interests the first consideration, we think it clear that they demand that the Bench of this Province should be reinforced by at least two first-class equity lawyers. At present the only equity lawers on the Bench are the Chancellor and his colleague, Mr. Justice Proudfoot. Mr. Justice Ferguson, though he has of late years, by force of circumstances, been compelled to study the principles of equity, was prior to his appointment to the Bench a common law practitioner. Mr. Justice Robertson's practice at the Bar was also almost exclusively confined to the common law. In neither of the other Divisions, nor in the Court of Appeal, is there a single judge who can be reasonably considered an equity lawyer; and yet purely equity cases are frequently tried by these judges who have to acquire their knowledge of the subject for the occasion. Considering the supremacy which the Judicature Act has given to equity principles, it is of great importance that in each Division of the Court there should now be at least one of the judges thoroughly versed in the principles of equity jurisprudence. Yet ever since the Judicature Act was passed, not a single equity lawyer has been appointed to the Bench. This may possibly be due to the

fact that most of the prominent equity lawyers are connected with the Liberal party politically, and this may, no doubt, have caused their claims to promotion to the Bench to be ignored. There is also the difficulty resulting from inadequate salaries, which no doubt deters leaders of the Bar from accepting judicial office. Neither of these obstacles to a proper selection are, however, insuperable.

SELECTIONS.

INSURANCE FOR WIDOW AND CHILDREN UNDER THE MARRIED WOMEN'S PROPERTY ACT, 1870.

A recent case before Mr. Justice North (*Re Seyton; Seyton* v. *Satterthwaite*, 56 L. T. Rep. N.S. 479; 34 Ch. Div. 511) has removed the doubts which have long hung over sec. 10 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).* By that section "a policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or of his creditors, or form part of his estate. . . . If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid." The first time that questions were raised on the meaning of this clause was in *Re Mellor's Policy Trusts* (6 Chy. Div. 127; 7 Chy. Div. 200). There the policy contained a recital that the assured had proposed to effect an insurance with the company upon his own life for the benefit of any wife, and also of any children or child who might survive him, and by the policy the capital stock and funds of the company were charged with and made liable to pay to such person as should be competent, or entitled, to give a good receipt and discharge for the same under the Act, within three calendar months after proof satisfactory to the directors of the company should have been given of the death of the assured, for the benefit of his wife and children or child, the full sum of £400, together with all other moneys payable thereunder, and all benefit thereof. The interests to be taken by the widow and children of the assured were not further or otherwise expressed upon the face of the policy. The assured left a widow and two daughters, and by his will he gave all his property to his widow absolutely, and appointed her one of the executors, and she proved the will alone. The widow and children then petitioned the court for a declaration of their rights and interests in the policy moneys, and asked for a distribution either as upon an intestacy, or else to the widow for life, with remainder to the children, according to the usual trusts of a settlement. Vice-Chancellor Malins refused the former alternative, because the words of the Act are that it is to be deemed a trust for the widow for her separate use. The money was therefore, he decided, to be held by the trustee, when appointed, upon trust for the widow for life, with remainder to her children, according to the usual trusts of a settlement, and with an ultimate remainder, if either daughter attained twenty-one or married, for the widow absolutely. Shortly afterwards an application was made in the same case that, as the husband had died intestate, and the income of the money to be received under the policy would be inadequate for the maintenance of the widow and children, the fund might be applied according to the provisions of the Statute of Distributions. The Vice-Chancellor held that he could interpret the provision in the 10th section as meaning that the fund "was to be held for the separate use of the widow as against a husband so long as the woman was married, and that it did not mean that a woman formerly married, but whose husband was dead, could

* See R. S. O. c. 120, s. 16.

not take a part of the capital with the sanction of the court. As the applicant was a widow, and proved to be in poor circumstances, he should hold that the money might be distributed as in the case of an intestacy."

For six years the question slumbered. But in 1883 it came again to the fore, in *Re Adam's Policy Trusts* (48 L. T. Rep. N. S. 727; 23 Chy. Div. 525). There the husband effected a policy for the benefit of his wife and the children of their marriage. He died intestate and insolvent, his wife and one child of the marriage having predeceased him. There was no intention of taking out administration to the husband's estate. The seven surviving children, three of whom were infants, petitioned the court for the appointment of a trustee of the moneys payable under the policy, for a declaration of the rights and interests of the petitioners in the moneys, and for an order upon the trustee to hold the moneys when received in trust for the children equally. Mr. Justice Chitty took a view of the Act which has not been adopted in the latest case. It appeared to him that the effect of the policy and of the Act taken together was to constitute a declaration of an executed trust, and that all the court has to do is to express its views of the construction of the two instruments taken together. Now there were only two possible constructions. One was, that the wife took for life, with remainder to the children; and the other was, that the wife and children took as joint tenants. The judge expressed his opinion that, upon a fair construction of the policy, the wife took a life interest, and this for two reasons: First, the Act says that the policy expressed upon the face of it to be for the benefit of the man's wife, or of his wife and children, shall be deemed "a trust for the benefit of his wife for her separate use and of his children, or any of them, according to the interest so expressed." If the wife took as a joint tenant, the words of the Act, so far as they give her an interest "for her separate use," would have no meaning at all. Assuming a joint tenancy, the wife has a right of severance immediately upon the fund falling in, or before the money is received, and the money is usually payable by the insurance office six months after the death of the assured; but it could scarcely be said that the Legislature contemplated the re-marriage of the wife within that period of six months, and that therefore the words "separate use" are intended to apply to so short a period. Secondly, in the 11th section of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the words "separate use" are omitted, because by sec. 1 (3) the presumption in future as to all married women is that their property is held for their separate use. For these two reasons the order in *Re Adam's Policy Trusts* was prefaced with an expression of opinion that the representatives of the wife and deceased child were not necessary parties to the petition, and that the surviving children took jointly. Mr. Justice Chitty characterized the first decision in *Re Mellor's Policy Trusts* (*ubi sup.*) as inexplicable, and confessed that he was unable to discover on what ground the Vice-Chancellor proceeded when the case came before him the second time, and he held that the fund ought to be distributed as in the case of an intestacy. The Vice-Chancellor was, he said, much too good a lawyer to hold that a fund held on trust for a wife and children should go as on an intestacy; and the only ground for his reference to the Statute of Distributions seemed to have been that the widow was in poor circumstances.

Now, however, the decision of Vice-Chancellor Malins has been explained. In *Re Seyton; Seyton* v. *Satterthwaite* (*ubi sup.*) the policy contained a recital that the husband was desirous of assuring his life under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and of the children of their marriage. And it certified that under the provisions of the Act his wife and the children of their marriage, whom failing, the heirs, executors or administrators of the husband, should be entitled to receive out of the funds of the institution at the end of six months after the decease, the sum of £4,000. There were issue of the marriage seven children; one died before the policy was effected, another died an infant in the lifetime of the assured, a third died shortly after his death under age. The other four were all infants, and defendants to a summons taken out by the widow, as sole executrix of her husband, devisee, and legatee of all his estate, and

testamentary guardian of the children, to determine the right of herself and her children in the policy moneys. On this Mr. Justice North decided that the widow and children took as joint tenants. The court has often taken hold of slight circumstances, in the case of a gift to a wife and children, as sufficient to indicate that the wife is to take for life with remainder to the children; but there was no such indication in the policy in question. The Act refers, as might be expected, to the policy itself for the expression of what the benefit intended is. In the policy there was not the smallest indication to justify the court in deciding that the widow was to take for life with remainder to the children. And there has never been a case in which the mere direction in a gift to a mother and children that the interest of the mother should be for her separate use has been held sufficient in itself, without more, to warrant the construction that the mother takes for life with remainder to her children. This being so, Mr. Justice North came to the conclusion that, whether the policy was considered alone or jointly with the Act, it amounted to a settlement on the wife and children by creating vested interests as joint tenants in such of them as were living at their father's death. As regards the decision in *Re Mellor's Policy Trusts*, it was pointed out that Vice-Chancellor Malins held, that the reference in sec. 10 of the Act to the wife's interest being for her separate use did not prevent her taking a share of the capital. "The learned counsel," said Mr. Justice North, "seems to have relied again on the Statute of Distributions, and to have confused the mind of the reporter thereby; but the Vice-Chancellor said nothing about the statute. He modified his order that there must be a settlement on the wife for life, with remainder to the two children, and held that they could all share in the capital. They must therefore all have taken like third shares; which are the exact proportions they would have taken in any fund as to which there had been an intestacy. I have no doubt that some remarks by the Vice-Chancellor to that effect, referring to the argument urged before him, are summarised by the reporter in the final words, 'that the money might be distributed as in the case of an intestacy.' The report, however, is not a satisfactory one." The case is not reported in the *Law Times*. With these conflicting decisions on the section, it seems very desirable that the opinion of Mr. Justice North should be indorsed by the Court of Appeal.

It remains to observe in this connection that a petition, presented since the coming into operation of the Married Women's Property Act, 1882, for the appointment of trustees of the proceeds of a life policy effected by a husband, under the provisions of the Married Women's Property Act, 1870, for the benefit of his wife and children, ought to be entitled in the matter of the Act of 1882, and also of the Trustee Acts. In *Re Soutar's Policy Trust* (26 Chy. Div. 236) the lamented Mr. Justice Pearson doubted whether section 10 of the Act of 1870 remains in force for any purpose, because sec. 11 of the Act of 1882 says that if at the time of the death of the assured there shall be no trustee, a trustee or trustees "may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same." And in another case under the Act of 1870 (*Re Howson's Policy Trusts*, Weekly Notes, 1885, p. 213) the petition of the widow and infant children asked for the appointment of a single trustee for the purpose of receiving the policy money from the insurance company, relying on the fact that sec. 10 speaks of the appointment of "a trustee." But Mr. Justice Pearson said that it would be contrary to the practice of the court to appoint a single trustee when a fund was to be retained on behalf of infants.

The sec. 11 (in the Act of 1882) is an amplification of sec. 10 of the Act of 1870, and differs from it in four respects. First, as has already been observed, it omits the words "for her separate use," as being superfluous. Secondly, it makes similar provision for a policy effected by a woman for the benefit of her husband and children as for one effected by a man for the benefit of his wife and children, and the subsequent provisions of the section apply equally to both. Thirdly, the more modern section enables the assured, by the policy or any memorandum under his or her hand, to appoint trustees, and to make provision for the appointment of new trustees, and for the investment of the moneys

Lastly, the new Act adds the provision that, in default of the appointment of trustees, or in default of notice to the insurance office, the receipt of the legal personal representative of the assured shall be a discharge to the office for the sum secured by the policy or for the value thereof, in whole or in part.—*Law Times.*

THE DUTIES OF RETURNING OFFICERS.

The decision of the Court of Appeal in the case of *Regina* v. *The Mayor of Bangor*, 56 L. J. Rep. Q. B. 326, is an important contribution to Parliamentary law, showing a tendency on the part of the judges somewhat to minimize the office of returning officer in the direction of making his duties ministerial. It also decides as part of the positive law of municipal elections that an alderman is eligible as a candidate for common councillor during the time when he is alderman, and blots out of the books a case of *Regina* v. *Coaks*, 23 Law J. Rep. Q. B. 133, having the authority of no less distinguished judges than Lord Campbell and Mr. Justice Crompton, but decided after several cases which the Court of Appeal consider inconsistent with it, and which certainly were not cited to the Queen's Bench of that day. In regard to the duties of the returning officer between the nomination and the return exclusively of both, the Court of Appeal interpret the rules of the Ballot Act, which apply to Parliamentary and municipal elections, in the sense that he is a mere counter of papers, a view which cannot but be considered novel and somewhat subversive of preconceived notions. In regard to municipal elections the effect of this ruling is that so soon as a candidate's name has passed the ordeal of nomination, he must be declared elected if he obtain a sufficient number of votes. Whether the mayor at a municipal election or the returning officer at a Parliamentary election can object to the eligibility of a candidate at the nomination, and whether the returning officer at a Parliamentary election can on his return reject a candidate who has obtained sufficient votes as ineligible, and return an opponent, are points left open, but undoubtedly the tendency of the decision is to reduce the character of the duties of these occasions from *quasi* judicial to ministerial. As there is no return at a municipal election the only point at which an objection to eligibility can be made is at the nomination, if even then.

The difficulty arose at the municipal elections for Bangor last November. For the election of councillor on November 1, Mr. Roberts, an alderman, whose term of office would not expire until November 9, and Mr. Pritchard, who was eligible, were nominated for one of the wards. Objection was taken to the nomination of Roberts before the mayor, but his nomination was received. When the returning officer for the ward counted the votes at the poll he found that Roberts had a majority, but he did not declare him elected, although the mayor took upon himself to announce the numbers. Two days afterwards the returning officer issued a notice that Roberts was disqualified, and that Pritchard was elected, and the rivals both took their seats. We believe that the result of this rivalry was that rival mayors were elected, one at one end of the Guildhall and the other at the other, and the Queen's Bench was called upon to relieve the deadlock. This they did by declaring in favour of Pritchard, issuing a peremptory *mandamus*, which, now that there is an appeal to the House of Lords in respect of it, will probably supersede the old practice of issuing in important or doubtful cases a writ of *mandamus* requiring a return. An appeal was immediately carried to the Court of Appeal, and the matter argued, adjudged and reported with a fulness worthy of the occasion. All the judges, except Lord Justice Lindley, admitted that the two offices were incompatible, but Lord Justice Lindley appeared to have been misled as to the dates, for he says, "As Roberts went out of office as alderman on November 9, and as his new office as councillor did not begin till November 9 there was no co-existence of the two offices." This, however, is a mistake. By section 52 of the Municipal Corporation Act, 1882, the day of election of councillors is November 1, and by sec. 60 the day for aldermen is November 9, and by sec. 13 (2) and 14 (6) these days respectively are the days of vacating the offices. Roberts's term of six years as alderman expired on November 9, and he

would, therefore, for eight days fill in fact both offices at the same time. Whether he filled both in law is a point fully argued by the Master of the Rolls, depending on the consideration whether the acceptance of the office of councillor was a vacation *ipso facto* of the office of alderman. A long string of authorities, beginning with 1765 and going down to 1841, were in favour of the view that the acceptance of the new office vacated the old. Against this view was the decision in *Regina* v. *Coaks*, and the fact that the Acts of 1835 and 1882 had since those cases considerably altered the precedure at municipal elections. The Master of the Rolls and Lord Justice Lopes disposed of the case of Coaks by saying that the question of the eligibility of the alderman in that case was concluded by the terms of the special case. The words of the special case were: "All the citizens who delivered their voting papers for Blake had notice that he was not eligible as councillor by reason of his then being an alderman of the city and not having resigned such office as alderman." It is difficult to see how a special case stated in terms like these by Chief Justice Jervis at Nisi Prius "stated the case out of court," as the Master of the Rolls says. It stated the fact of his being an alderman, and not whether he legally was an alderman. A better ground for discounting the case is to be found in the fact that the learned judges do not in their judgments deal with the point of eligibility, but rather with the point whether the votes were thrown away; and of the seven earlier cases cited in the Court of Appeal having the contrary effect not one was cited to them. It was impossible that the case of Coaks could stand against this weight of authority, unless the then recent statute made a change in the law. It was contended for Pritchard that the result of this view of the Act would bring about that the alderman would be subject to a fine for resigning his office. On this point the Master of the Rolls says: "I do not now decide, but I assume for the purposes of this case that he is liable, and that by accepting the office of councillor, and thereby resigning the office of alderman, he elects to pay the fine." Lord Justice Lopes says: "I very much doubt whether he would be liable to a fine." On turning to sec. 36, the fine imposed does not seem to be of a very penal nature. It provides that "a person elected to a corporate office may at any time by writing signed by him and delivered to the town clerk resign the office on payment of the fine for non-acceptance thereof." In the case of an alderman the fine is £25. Before the Act of 1835 a resignation was an indictable offence, so that the milder view taken by the Act would strengthen the position taken up by the Court of Appeal if this section applied to a resignation brought about by accepting another office. Moreover, the fine appears to be rather a composition than a penalty. A resignation by operation of law is not a resignation by writing under the section, and it thus appears that the Act does not contemplate resignations by operations of law, such as existed before the Act of 1835. There is, however, a formidable argument against the view of the Court of Appeal, in the confusion it may introduce by allowing a candidate to be nominated who is only contingently qualified. No doubt, as the contingency is his being elected, no great harm is done, but the rule is contrary to that in force at Parliamentary elections, at which a candidate must be qualified at the time of nomination. It seems also strange that the Act should, by section 14, sub-section 4, have expressly provided for the vacation of the seat on a councillor becoming an alderman, but is silent in regard to the converse process.

Little need be said of the interpretation put on the Ballot Act. It is read literally. By section 2 the returning officer shall open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidate or candidates to whom the majority of votes have been given. The word "candidate" is read not as eligible candidate, but as a candidate whose name appears on the nomination paper. Again, Rule 45 of the Ballot Act, which requires that the returning officer shall "give public notice of the names of the candidates elected," is interpreted to mean the names of the persons nominated who have the most votes, whether eligible or not. Whether after this decision there is any shred left of the judicial duties of the returning officer in regard to the eligibility of can-

didates is a matter of doubt. The Master of the Rolls reserves the question whether the mayor at the nomination may reject a candidate as ineligible, and whether the returning officer at a Parliamentary election may reject as ineligible the candidate with most votes. These, however, are crucial points in the action of the respective officers, and it were better first to decide their duties in regard to them, and afterwards to decide their duties on minor occasions. It can hardly have been intended that the duties of a returning officer should be at one point to declare a candidate elected, and at another point to return some one else. So far as municipal elections are concerned, the duties of the mayor at a nomination appear, by Rule 9 of Part 2 of Schedule 3, to be confined to objections to nomination papers. How far this strict interpretation of the Ballot Act will affect Parliamentary elections remains to be decided. At present all that is definitely laid down is that the returning officer of a ward at a municipal election is a ministerial officer, but indirectly the decision appears to go far towards making the duties of all returning officers purely ministerial.—*Law Journal.*

EMPLOYERS' LIABILITY FOR DEFECTIVE PLANT.

In *Thomas* v. *Quartermaine*, 56 Law J. Rep. Q. B. 340, reported in the June number of the *Law Journal Reports*, the Court of Appeal differed in opinion as to the meaning to be put on the obscure expression of the Legislature at the end of section 1 of the Employers' Liability Act, 1880,* as applied to the first of the subjects on which the law of master and servant is altered. "Where," says the section, "personal injury is caused to a workman by reason (among other things) of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the employer, the workman shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of, nor in the service of, the employer." The enacting part of this provision, so far as regards the other three cases mentioned in the section, all of which involve the old doctrine of common employment, can have an intelligible meaning given to it. The words "as if the workman had not been a workman," however inept, may be read to destroy the doctrine of common employment. What is their meaning when applied to the case of defective machinery? Lord Esher differs on this point from Lord Justice Bowen and Lord Justice Fry. Lord Esher's view is that the words "as if he were not a workman" mean in this application that "the employer shall pay." The workman has only to establish a defect in the plant of his employer, and damage arising out of that defect to himself, and he can call on his employer to compensate him. On the other hand, Lord Justice Bowen and Lord Justice Fry consider the effect of the words to be, to convert the workman's relation into the same relation to the employer as if he were a stranger invited on to the premises by the employer. There are grave difficulties in the way of both those views. If Lord Esher be right, why did not the statute impose the liability for defective plant directly on the employer instead of using words which evidently refer to the responsibility of the master only in regard to the acts of fellow-servants? On the other hand, the interpretation of Lords Justices Bowen and Fry seems inconsistent with itself, especially as put by Lord Justice Bowen—that is, on the doctrine, that the workman incurred the risk with his eyes open. The learned judges assume that the workman is a stranger, but they impute to him the knowledge he possesses as a workman. There is a third construction of the section which makes the whole tolerably intelligible. It is this, that the "defect" referred to, which is to throw the liability on the employer as if the workman were not his workman, means a defect brought about by the negligence of a fellow-workman. The only difficulty in the way of this interpretation, apparent on the statute itself, is that section 2, sub-section 1, provides that "the defect under sub-section 1 of the previous section shall arise from, or not be discovered or remedied owing to, the negligence of the employer" or his superintendent; but the object of this clause seems rather meant to include within the jurisdiction of the

* See 49 Vict. c. 28, s. 3 (O.).

County Court the old common law form of action in which the employer was made liable for his own personal positive negligence, than to give any wider meaning to section 1, sub-section 1, than was necessary to rescind the rule as to fellow-servants, so far as the plant was concerned. A further difficulty, however, was in the way of the Court of Appeal in the shape of the decision in the case of *Cripps* v. *Judge*, 53 L. J. Rep. Q. B. 517, a case disposed of in a few brief sentences, following *Heske* v. *Samuelson*, 53 Law J. Rep. Q. B. 45. In *Cripps* v. *Judge* the Court of Appeal, composed of the same judges as sat in *Thomas* v. *Quartermaine*, held that sub-section 1 of section 1 of the Employers' Liability Act of 1880 imposed a liability on the employer for damages caused by reason of defects in his plant in point of its original design and construction. Both *Heske* v. *Samuelson* and *Cripps* v. *Judge*, were respectfully criticised at the time of their decision in these columns; and it was submitted that the only defects included were defects arising in the course of use. The complication which they add to the present question considerably increases the doubts expressed of those decisions.

The views of the Master of the Rolls of the effect of sub-section 2 of section 1, read with section 2, sub-section 1, is that it clears out of the way of the workman the two doctrines that he could not recover for the negligence of his fellow-servant, and that he undertook the risk of the service. The action, then, in his opinion, resolved itself into the ordinary action of negligence, which he proceeds to treat according to his well-known views on the subject, as expressed in *Heaven* v. *Pender*. This doctrine he expresses on this occasion in the words that "the duty in these cases is that you shall do nothing to injure a man who is near you, and of whose proximity you are aware." He applies this doctrine to the Employers' Liability Act by saying that "the Act recognizes, if it does not impose, the duty upon the master to use reasonable care, and not to have the ways, works, machinery, or plant in a defective condition." The answer to this view seems to be found in the words of Lord Justice Bowen when he says "that an Act which distinctly provides that the workman is to have the same right as if he were not a workman, cannot, except by violent distension of its terms, be strained into an enactment that the workman is to have the same rights as if he were not a workman and other rights in addition." In other words, although the workman ceases to be a workman, so far as his legal disabilities are concerned, he does not cease to be a man, and therefore the master is not responsible to him unless as between man and man, he would have been responsible to a stranger. The difficulty is where to draw the line which the statute has not drawn for us. It is impossible to read the statute literally, because that renders it nugatory. If the workman is only to have the same rights as if he were not a workman, nor in the service of the employer, he would literally have no rights at all, because his identity would be destroyed, and he would be as if he had not been on his master's premises at all or only there as a trespasser. The statute must, therefore, be construed so as to give the workman a status not so low as a trespasser, but better than a workman. This status is that of a visitor, or of a person lawfully on the premises of another by his invitation. So far the reasoning of the Lords Justices will be concurred in, but we think it unfortunate that they should have resorted to the very vague and unsatisfactory maxim, "*Volenti non fit injuria*," in order to show what the duty of Quartermaine was to Thomas in this case. The maxim, no doubt, has sometimes been loosely applied, but it properly means simply that an injury is no injury to the person who consents to it. In explaining that a trespass is excused by a license the maxim is appropriate, but in this case the man was very far from *volens*. The very last thing he wished to happen to him was a fall into the vat. Moreover, so soon as we begin to look at the intention of the parties as defining the duty of one to the other, we enter upon the region of contract, which region in regard to this subject of master and servant the statute intends to close to us. There was no necessity to resort to the maxim at all, because it is settled law that the duty of a proprietor to a visitor is to guarantee him against traps, and not to guarantee that every object he may meet during his stay is in the highest possible

condition of perfection. The phrase, *volenti non fit injuria*, is not used in *Indermaur* v. *Dames*, 35 Law J. Rep. C. P. 184, which is the leading case on the question of the duty of the proprietor to a visitor.

The decision of the Court of Appeal, it is to be observed, was delivered on the assumption that there was evidence of negligence on the part of the employer, not such evidence as would have satisfied the old common law rule imposing liability on the employer, but such as would satisfy the requirements of section 2, sub-section 1. The County Court judge so found, and there appears to have been no motion made to alter his findings on this head on the ground that there was no evidence in law to support it. At the same time it is difficult to see what evidence of negligence there was. The County Court judge appears to have been of opinion that the vats ought to have been fenced, in order that a man engaged in such an operation as that in which Thomas was engaged—namely, removing a lid from underneath an adjoining boiler—might not fall into the vat through the lid being jammed, and the man too eagerly pulling at it. The combination of circumstances seems to have been such that no employer, however prudent, was likely to expect it, or could be blamed for not anticipating it. The case, therefore, must not be used as a precedent on this point, but it stands good for the position that a workman in regard to his employer's plant is in the same position as a visitor to his premises. Lord Justice Fry draws an elaborate distinction between willingness to assume danger, which he says affects the duty of the defendant, and contributory negligence, which affects the right of the plaintiff to recover. Whether the distinction is sound, except when the negligence in the one instance is matter of contract, we are not prepared to say; but in order to understand the Lord Justice's statement, a correction must be made in the text of his judgment. He says: "There are two matters which are liable to be confused and yet are inseparable in reason," when he meant, no doubt, to say "separable." —*Law Journal.*

NOTES OF CANADIAN CASES.

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QUEEN'S BENCH DIVISION.

McGREGOR v. DEFOE.

Illegal distress for rent—Over-holding tenant—Removal of goods.

Plaintiff remaining in possession and paying rent after expiry of term, defendant distrained on his goods on the premises six miles from Toronto for two months' arrears of rent, removing goods to Toronto to impound and sell.

Held, that the relationship of landlord and tenant existed at time of distress; and that the removal in question of the goods, unless unnecessary and unreasonable, or malicious, was not a good ground of action.

G. T. Blackstock, for motion.

J. E. Robertson, contra.

Div. Court.]

McGREGOR v. BISHOP.

Promissory note—Partial failure of consideration—Parol agreement to reduce full value of note by $500—Indorsement after maturity.

Defendants bought stock of C. for $5,500, covenanting to pay same, the deed also providing part of amount was to be secured by four promissory notes of $1,100 each. After maturity of last note C. indorsed it *sans recourse* to plaintiff. To action on note, defendants pleaded that C. misrepresented value of goods, and agreed before maturity of note to allow reduction of $500 from its face value, and that plaintiff took note after maturity. Defendants paid $626.50 into court, the balance due on note, with interest. At the trial plaintiff admitted he claimed to occupy no different position from C. Defendants' evidence showed a verbal agreement to make the reduction of $500, but there was nothing in writing. C swore he never made the agreement. The judge found C. had, and that plaintiff stood in

same position as C., dismissing action with costs.

Held, right, and that plaintiff was bound by the verbal agreement.

A. C. Galt, for motion.

W. Nesbitt, contra.

Div. Court.]

REGINA v. DUNNING.

Weights and Measures Act—Crime—Evidence of defendant—Imprisonment—Jurisdiction—Certiorari. Conviction bad in part.

Defendant was convicted by two justices under Weights and Measures Act (42 Vict. ch. 16, s. 41, ss. 2 [D.]), as amended by 47 Vict. ch. 36, s. 7 (D.), of obstructing an inspector in discharge of duty, and fined $100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress. At the hearing defendant tendered his own evidence, which was rejected, when he appealed to the General Sessions, again tendering himself as a witness, but with same result, and the conviction was affirmed. On motion for certiorari,

Held, that conviction being affirmed on appeal, certiorari was taken away, except for want or excess of jurisdiction, neither of which existed, as the justices and General Sessions had jurisdiction to determine whether defendant's evidence was admissible or not, and their judgment, even if wrong, could not be reviewed by certiorari.

Per ARMOUR, J.—That even if they could be reviewed, the justices were right, as the offence charged was a crime.

Held, also, ARMOUR, J., dissenting, that imprisonment was justified in default of distress, by 32 & 33 Vict. ch. 31, s. 62 (D.), incorporated in Weights and Measures Act, by s. 53 thereof; but that if imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment.

Per ARMOUR, J.—That 32 & 33 Vict. ch. 31, s. 62 (D.) should only be construed as fixing the duration of the term of imprisonment where the special Act provides specifically for some imprisonment without fixing its duration; and that as no imprisonment is expressly imposed by the Weights and Measures Act for the offence charged here, so much of conviction as awarded imprisonment was *ultra vires*, and therefore bad; but that it was separable from the residue of the conviction, and should be quashed, the residue standing.

Shepley (*McDougall* with him), for motion.

Clement, contra.

Div. Court.]

SHAW v. ONTARIO COTTON MILLS CO.

Master and servant—Negligence—Injury to workman—47 Vict. c. 39, s. 15, ss. 1 (O.)—49 Vict. 28, s. 3, ss. 1 (O.)

In defendants' dyehouse were a number of vats for boiling cotton. While employed in defendants' factory plaintiff had to stand on top of one of the vats, the covering of which was some boards. Plaintiff, about 3rd Dec., 1886, complained to the foreman of the insufficient number of boards for the purpose, but without effect, and on 6th of same month a board on which he was standing slipped, and he was thrown into the boiling liquid. Then defendants remedied the defect. A similar accident had occurred two years before.

Held, setting aside a nonsuit at the trial, that there was evidence enough of negligence on defendants' part in not guarding the vat, under 47 Vict. ch. 39, s. 15, ss. 1, the Ontario Factory Act, to have justified the jury in finding for plaintiff, and that apart from the Factory Act plaintiff could have sued under 49 Vict. ch. 28, s. 3, ss. 1, the Workmen's Compensation for Injuries Act; and that the maxim *Volenti non fit injuria* did not apply to this case.

Staunton, for motion.

Mackelcan, Q.C., contra.

Div. Court.]

STANDARD BANK v. DUNHAM.

Promissory note—Partnership—Liability of retiring partner for note signed in firm name after dissolution.

D. carried on business at M. from Feb., 1886, to 1st September, 1886, under style of D. & Co. He also did so at T. with P. from

1st May, 1886, to 1st August, 1886, under same name. It was agreed between D. & P. that D. should not sign firm's name to bills or notes. Their dissolution was not advertised till 20th August, 1886. D., for his own purposes, and without knowledge of P., on 11th August, 1886, signed notes for $21,000 with firm's name and gave them to I. The note in question in this action was one of these, but dated 30th July previously. Plaintiffs, in ignorance of P. being a member of the firm, took the note, without notice of any infirmity, in security for a pre-existing overdue debt. The judge at the trial told jury plaintiffs could resort to either for payment.

Held, misdirection, and that there was no such right of election; that creditor must prove who his debtor was, and defendants need not prove they were not the debtors.

Held, also, if note given before 1st August, judge should have asked jury which firm D. intended to bind; but as note not given during the partnership, and plaintiffs were ignorant of firm, or that P. was a member, the question was not material.

Held, also, that plaintiffs being ignorant of firm of D. & Co., or its members, and having had no dealings with it, P. was not liable on the note signed after 1st August, when the dissolution took place, though before 20th August when publication of same was made. The facts being all before them, the court, instead of ordering new trial, gave judgment for P., with costs.

J. K. Kerr, Q.C., and *John A. Paterson*, for motion.

Lash, Q.C., and *Holmes*, contra.

Div. Court.]

BALLARD v. STOVER.

Will—Devise—Trust—Trustee—Beneficial interest—Intestacy—Construction—"Share and share alike"—"Survivors and survivor."

A testator devised as follows:

"I will devise and bequeath unto William Stover, Ephraim Stover, Adam J. Stover, William Francis Jacob and Jacob Stover . . . their heirs, executors, administrators and assigns for ever, all my real and personal property, share and share alike . . . upon trust that they, or the survivors, or survivor of them shall, out of the said real and personal estate, suitable and well, support Mary Stover, my present wife, in as comfortable a position as she now has with me, for and during her natural life.

"I hereby nominate, constitute and appoint the aforesaid W. S., E. S., A. J. S., and W. F. J., executors of this my last will and testament."

The plaintiff and the defendants, the above named executors and the other defendants, were all nieces and nephews of the testator, and would have been entitled to share in the testator's estate in the case of his dying intestate.

Held (ARMOUR, J., dissenting), that the trustees took the beneficial interest in the estate, subject to the maintenance of the testator's wife.

Per ARMOUR, J.—The trustees took no beneficial interest in the estate, and after the death of the testator's wife, the purposes of the will were satisfied, and the estate passed to the plaintiffs and those entitled as in the case of intestacy.

Div. Court.]

WINFIELD v. FOWLIE.

Interpleader—Practice—Evidence of intention to extend operative force of a deed—R. S. O. caps. 102 and 104—Short Forms Acts—Onus probandi in interpleader issues—Mill and machinery, realty or personalty—Dominant and servient tenements—Partnership rights under fi. fa. against one partner—Analogy between operative words in wills and deeds.

In December, 1874, Hugh Kean purchased machinery in question for $1,529. In March, 1875, Hugh K. placed this machinery in the mill in question, which cost $600, and was erected by Alexander K., with Hugh K.'s money, in the water opposite lot 15, con. 7, township of Tay, county of Simcoe, over two hundred feet from low water line, and outside the limits of lot 15, even had the lot been all dry land.

The mill was built on a framework of logs sunk to the bottom of the bay and kept there by stones, the foundation of the mill being bolted to the upper logs, and the machinery

in question being, till its removal by defendant, securely fastened to the mill.

On 18th March, 1875, Hugh K. and Alexander K. entered into partnership, articles of which appeared in evidence, whereby it was agreed *inter alia* that they should purchase a parcel of land in the said township and erect thereon a shingle factory; and furnish funds equally, and divide all profits and share all losses; each partner to have power to purchase land for said business, the partnership to continue twenty years unless dissolved by mutual consent. Hugh K. never got anything out of said business; this partnership was never dissolved, but Hugh K. abandoned all interest in it in 1877, though retaining his legal claim, while Alex. K. from its erection had sole charge and control of the business. In September, 1876, Alex. K. purchased from one W. D. Ardagh for $400 the said lot 15, and received a Short Form Deed under R. S. O. cap. 102, wherein the land was described by exact metes and bounds, the water limit being described as "following the course of the water's-edge." All subsequent documents of title refer to this description, and none contain any reference to a mill or machinery.

The mill was connected to the land by a foot-bridge. The land was used as a convenient piling-ground. The mill was placed in deep water to facilitate floating logs to it.

There was no evidence of the intention of Ardagh in giving this deed to Alex. K. On 1st June, 1877, Alex. K. borrowed from John K. $1,000 for nine months for purpose of the business, giving a mortgage under R. S. O. cap. 104, on this lot, believing the mill to be covered by the mortgage. On same date Hugh gave a collateral mortgage on same land because required by John K., who knew of the partnership, and that Hugh K. had paid for the mill and machinery. This mortgage debt was never paid. In June, 1883, the plaintiff recovered a judgment against Alex. K. On 4th July, 1883, John K. gave Alex. K. the usual notice of sale, and from that date considered the property his own.

In Sept., 1885, John K. gave one Frank K. a power of attorney to sell the said lot 15, intending to authorize him to sell the mill and machinery also. In Sept., 1886, Frank K. sold the land, mill, and machinery to defendant. On 25th February, 1886, John K. gave defendant a deed of the lot under the power of sale in his mortgage, intending to convey to him also the mill and machinery. On 8th March, 1886, defendant paid the consideration, and received a receipt in full for the property, mill and machinery, and authorizing defendant to "remove the mill and machinery at once." This was the only document in which the words "mill," or "machinery," etc., appear.

By 6 a.m. on 11th March, 1886, defendant had the mill and machinery removed and loaded on G. T. Ry. cars for shipment; at 10 a.m. an alias fi. fa. against goods of Alex. K. was issued by plaintiff, and the mill and machinery was seized in possession of defendant, and this issue was directed in the usual course.

It clearly appeared that all parties considered the mill and machinery as part of the adjoining lot.

At the trial the learned judge *held*, 1st. No evidence of intention could be received to extend the operative force of the documents of title; 2nd. The claimant (the defendant) must succeed by the strength of his own title and not by weakness of plaintiff's; 3rd. The mill did not pass under the documents, and plaintiff must succeed.

On rehearing before Divisional Court,

Held (O'CONNOR, J., dissenting), evidence of intention is admissible to show what the parties to a conveyance mortgage, etc., intended to pass thereunder.

Held (O'CONNOR, J., dissenting), this mill and machinery having been "used, occupied and enjoyed," with the land in question, would pass with a statutory deed or mortgage of the land, the short form having the same force as the long form set out in detail in R. S. O. caps. 102 and 104.

Held (*per* WILSON, C.J.), evidence of intention being admissible, the title of Alex. K. would pass to John K. under the statutory mortgage pursuant to the full language of No. 13. Column 2, R. S. O. cap. 104, which includes all the right and title of the mortgagor in the "premises hereby conveyed or mentioned or intended so to be."

Held (*per* WILSON, C.J.), the plaintiff must establish his title to the property in question in interpleader issues.

Held (*per* WILSON, C.J.), if the mill and machinery were personalty, it would in any event

be subject to the mortgage debt, and the partnership demands of one partner, as against execution creditors of the other partner.

Held (*per* ARMOUR, J.), the mill and machinery in question so placed became part of the realty.

Held (*per* O'CONNOR, J.), the purpose for, and manner in, which the property is used are to be considered in questions of title, hence the mill being the dominant tenement could not pass under a deed, etc., of the land which was the servient tenement, and R. S. O. caps. 102 and 104, must be strictly construed.

The practice of making execution creditors plaintiffs in interpleader issues commented upon by ARMOUR, J.

The analogy between decisions on R. S. O. caps. 102 and 104, and decisions on such words when used in wills, commented on by ARMOUR, J.

Lount, Q.C., for plaintiff.

Kean, for defendant.

CHANCERY DIVISION.

Ferguson, J.] [June 10.

McGEE v. KANE.

Trial after demurrer—Admissions in defence—Estoppel by conduct.

Where the plaintiff sued to recover land and it was objected at the trial that he had not properly proved his title, and it had appeared that he had proved all the material allegations in his statement of claim, and that the statement of claim had previously been held good on demurrer.

Held, that he was entitled to judgment, and that the rule that a party shall not succeed upon proving his pleadings, unless the judge is of the opinion that he should succeed, cannot be applied to a case where the pleading has been held good upon demurrer.

By way of a special separate defence in the action the defendant set up that one J. K., through whom the plaintiff proved title, was the patentee of the lands, and then went on to allege that he was thereby entitled to a fee simple therein as trustee for her.

Held, that this allegation that J. K. was patentee of the lands could not be made use of by the plaintiff to satisfy any defect in his evidence to prove the case, the burden of which rested upon him by reason of the pleadings of the defendants, which alleged possession in herself and her tenant as aforesaid.

The defendant also alleged that in certain proceedings theretofore had by the plaintiff for the purpose of selling the lands now claimed, under an execution obtained by the plaintiff against her, the plaintiff had asserted that the lands were hers, and that he was therefore now estopped from saying that they were not hers, but that all the time they had belonged to J. K., who had conveyed to him.

Held, that no such estoppel existed for fraud was necessary to the existence of estoppel by conduct, and the person to whom the alleged representation was made must have been ignorant of the truth of the matter, whereas the representation relied on here, assuming it to be made, was made by a person who was not ignorant of the truth of the matter, for the defendant must be taken to have known as well as the plaintiff could know, whether or not she was the owner of the land, or what, if any, interest she had in it.

In advertising certain property to be sold under writs of execution, the sheriff stated in the advertisement that he had seized and taken in execution the lands (describing them), and that these lands, or the right, title and interest of the defendant therein, would be offered for sale by him.

Held, that this form of advertisement was sufficient, and that it was not necessary for the advertisement to define more precisely the nature of the estate or interest to be sold.

Christie, Q.C., and *O'Gara*, Q.C., for the plaintiff.

McCarthy, Q.C., and *Mahon*, for the defendant.

Div. Court.] [June 18.

COX v. HAMILTON SEWER PIPE CO.

The Workmen's Compensation for Injuries Act, 1886—*Negligence of superintendent—Notice of action*—49 *Vict. c.* 28, *secs.* 3, 7, 10 (*O.*).

Solicitors for the plaintiff before action wrote as follows to the defendants :—

"We have been consulted by Mr. J. Cox

concerning injuries sustained by him while in your employ by which he lost his left hand. We have received instructions to commence an action against you for damages, unless the matter is satisfactorily settled without delay. If you intend contesting this suit, kindly let us have the address of your solicitors who will accept service of process on your behalf."

Held, reversing the decision of SIR M. CAMERON, C.J., that this was sufficient notice of action to satisfy the requirements of 49 Vict. c. 28, s. 7 and s. 10 (O.).

Held, also, that the evidence in this case *prima facie* brought it within s. 3, ss. 3, and the nonsuit must be set aside and a new trial had.

If, while in obedience to orders, injury arises through the negligence of the one giving the orders it is sufficient. No specific order at the time of the injury is requisite.

Lash, Q.C., for the plaintiff.

Osler, Q.C , for the defendants.

Chy. Div. Court.] [June 29.

PARKER v. MAXWELL.

Locatees—Timber license—Free grant—43 *Vict. c.* 4 (*O.*).

The meaning of the Act, 43 Vict. c. 4, relating to free grants, is that all standing pine belongs to the Crown; when cut during the process of actually clearing the land for cultivation, or in order to build and fence on the location, it belongs to the locatee: otherwise, when cut, it still continues the property of the Crown. The Statute, having regard to the usual course of operation by settlers, does not contemplate a locatee reserving trees and leaving them standing or uncut during the process of clearing. Where the clearance is all are to be removed, and as to all pine in the clearance so removed the Crown waives its rights in favour of the locatee. But it is not competent for the locatee to leave pine uncut upon his clearing with a view of having a timber reserve for future building or fencing purposes, so as thereby to oust the superior title of Her Majesty.

These principles were applied in the present case, in which the plaintiff sued the defendants who had converted to their own use certain pine trees upon the land which the plaintiff held as locatee, the defendants claiming to have a right to cut the same under a timber license from the Commissioner of Crown Lands.

Pepler, for the plaintiff.

Lount, Q.C., for the defendant.

Leave given to appeal.

Chy. Div. Court.] [June 29.

WARNOCK v. KLEPFER.

Insolvent—R. S. O. c. 118—48 *Vict. c.* 26, *s.* 2.

A man may be deemed insolvent in the sense of the Act, R. S. O. c. 118, as amended by 48 Vict. c. 26, s. 2, if he does not pay his way, and is unable to meet the current demands of creditors, and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

Held, under the circumstances of this case, that a certain assignment of book debts made by J. M. to the defendant was made by him when in insolvent circumstances, and was void as against the plaintiff under the above Act.

McCarthy, Q.C., and *G. W. Field*, for the defendants, appellants.

Masson, Q.C., for the plaintiff.

Chy. Div. Court.] [June 29.

NISSOURI v. DORCHESTER.

Municipal corporations — Drainage works — 46 *Vict. c.* 18, *ss.* 570, 598.

The township of N., on the petition of seven out of ten property owners, passed a by-law under 46 Vict. c. 18, s. 570, for construction of a drain which was to extend through the adjoining township of D., forming one entire scheme of drainage through both townships. The property owners directly affected by the work were thirty-nine in D. and ten in N., and the rateable division of the costs of the work was $1,345 to be paid by N., and $5,725 by D.

This action was brought by N. to compel D. to pass a by-law under 46 Vict. c. 18, s. 581, to raise its proportion of the fund, which it refused to do.

Held, that the case was not one contemplated by s. 570 and following sections, but fell within s. 598, and that the county council was the proper authority to pass a by-law for

the construction of such a drain as that proposed; but apart from that, even under s. 570, in cases where the drainage work extends beyond the limits of one township, a petition by the majority in number of the persons to be benefited in any part of the townships would seem to be required, the parts of both townships being considered for the purpose of the Act as forming a quasi-municipality for the proper drainage of the particular locality, so that a majority of all that section formed by the combined parts of the two municipalities may ask for, and if the council of the originating township thinks proper, obtain the needful relief.

W. W. Fitzgerald, for the plaintiffs.

W. R. Meredith, Q.C., for the defendants.

Chy. Div. Ct.] [June 29.

MCPHAIL v. MCINTOSH.

Will—Construction—General intention in favour of a class—Particular intention in favour of individuals.

Judgment of Rose, J., noted *supra* p. 253, affirmed.

Moss, Q.C., for defendant, who appealed.

Cattanach, for plaintiff.

Chy. Div. Ct.] [June 29.

WELLS v. LINDOP.

Slander—Qualified privilege—Bad faith—Malice.

Action of slander. Motion after new trial of the case reported 13 O. R. 434, the defendant now in this action pleading privilege, and the motion being to set aside the verdict of $350 for the plaintiff, or for a new trial.

Held, that though the occasion on which the defamatory words were spoken was one of qualified privilege; yet inasmuch as it appeared that the defendant used the words in bad faith, not believing at the time the statements made by him to be true, the defendant's expressions were in excess of the requirements of the occasion and malicious, and he was not protected.

Osler, Q.C., for plaintiff.

Aylesworth, for the defendant.

Ferguson, J.] [July 6.

DOWNEY v. DENNIS.

Trustees—Discretion—Power of sale—Reserve bid.

Motion for injunction restraining trustees under a will selling certain property without a reserve bid.

The will in question contained the following trust for sale: "And whereas trouble and discontent may arise among my family with regard to the property which I own in Toronto, on account of its being put out of the power of my trustees to sell and dispose of said property, I hereby order, direct and fully authorize at and after twenty years of my death my trustees, to whom I have hereinbefore devised my property in Toronto in trust, to absolutely sell and dispose of the said property in Toronto to the best advantage, the proceeds thereof to be equally divided between my heirs, share and share alike."

The twenty years having expired, the trustees had now advertised the property to be sold without reserve.

Held, on motion for an injunction by one of the heirs, that the court had jurisdiction to enjoin the trustees from selling the property without proper care, and endangering the rights and interests of the plaintiffs in any way that is needless, and that the evidence in this case showed that to sell the property without reserve would be to do this, and therefore an injunction must go to restrain the proposed sale without reserve.

The Attorney-General of Ontario, for the plaintiffs.

Lash, Q.C., and *Roaf*, for the adult defendants.

Hoskin, Q.C., for the infant defendants.

Boyd, C.] [April 6.

THE CATHEDRAL OF THE HOLY TRINITY v. THE WEST ONTARIO PACIFIC RAILWAY COMPANY.

Expropriation by Railway Co. of part of block of land acquired for specific purposes—Liability to take whole block—Right to exercise option after taking possesion—Damages—R.S.C. c. 109, sec. 100, cl. 2.

The plaintiffs were incorporated under 37 Vict. c. 91 (O.), for the purpose of building a cathedral, and were the owners of a block of land enclosed in one fence, and bounded on three sides by streets known as the Cathedral or Chapter House Block, upon which they had erected a chapter house as part of the cathedral, but for want of funds the other part of the cathedral was not proceeded with for some years.

The defendants, in constructing their railway, required part of the block for their line, which would cut off a part of the cathedral when erected, and took possession of it; but the plaintiffs, under the circumstances, declined to sell or convey or arbitrate as to the value of anything less than the whole block. In an action to compel the railway to take the whole, and desist from their proceedings as to part only, it was

Held, that the block of land was set apart for cathedral purposes, and had not by any default of the plaintiffs lost that distinctive ecclesiastical character, and an injunction was granted against the railway taking a part only, as in *Sparrow* v. *The Oxford, etc., R. W. Co.*, 2 D. M. & G. 94.

It was contended by the plaintiffs that the defendants having taken possession could not withdraw but must take the whole block.

Held, that the mere going into possession, although a high-handed act on the part of the defendants, did not necessarily commit them to the purchase of the whole; and that the defendants should have the option to take the whole, or withdraw and pay all damages and costs sustained by the plaintiffs.

Semble, In *Grimshawe* v. *The Grand Trunk Ry. Co.*, 15 U. C. R. 224, it was thought there was power to withdraw after possession taken, *a fortiori*, should that be permissible, when the possession was merely of a part, and having reference only to that part, and it was found that the proprietor objected to the company having that part unless on condition of taking the whole.

Hellmuth, for the plaintiffs.

Meredith, Q.C., and *Cronyn*, for the defendants.

REVIEWS.

COMMERCIAL UNION IN NORTH AMERICA.—We have received a pamphlet embodying a number of letters, papers and speeches on the subject of Commercial Union between the United States and Canada, collected and published by Mr. Erastus Wiman, of New York. Commercial Union between the United States and Canada is very like the union which takes place between the alligator and the fly. The alligator suns himself in the river with his mouth wide open, the flies rush in and settle on his tongue, his mouth suddenly closes with a snap and the union is complete. So it will be with Canadian flies if they are too much taken up with the charms of the tongue of the American alligator.

OSGOODE HALL LIBRARY.

The following is a list of books received at the library during the months of April, May and June, 1887:—

Addison on Torts. Sixth edition. London, 1887.
Arnold on Marine Insurance. Sixth edition. London, 1887.
Bates' Limited Partnerships. Boston, 1886.
Bennett on *Lis Pendens*. Chicago, 1887.
Bigelow's Supm'nt Overruled Cases. Boston, 1887.
Birdseye's Table N. Y. Statutes. New York, 1887.
Bishop on Contracts. Chicago, 1887.
Black's Constitutional Prohibitions. Boston, 1887.
Blackburn's Contract of Sales. Philadelphia, 1887.
Burrill on Assignments. Fifth edition. New York, 1887.
Bythewood's Conveyancing. Fourth edition. Vol. 4. London, 1887.
Chitty's Equity Index. Vols. 3 and 4. London, 1886.
Clifford's Private Bill Legislation. London, 1885-87.

Cook on Stock and Stockholders. New York, 1887.
Cox & Co.'s List of Persons Advertised. London, 1887.
Dale & Lehman's Digest Overruled Cases. London, 1887.
Ellis' Trustees Guide to Investments. London, 1887.
Freeman on Cotenancy and Partition. San Francisco, 1882.
Hammick's Law of Marriage. London, 1887.
Harris' "What is to be Done Before Trial." London, 1886.
Healey's Joint Stock Companies. Second edition. London, 1886.
Heard on Civil Precedents. Boston, 1886.
Hill's Repression of Crime. London, 1857.
Index to Local and Private Acts. Ottawa, 1887.
Jardine on the use of Torture in England. London, 1837.
Jones on Chattel Mortgages. Boston, 1883.
Lambard's Eirenarcha. London, 1614.
Law List (English). London, 1887
Lee's Bankruptcy. Third edition. London, 1887.
Maine's Ancient Law. Eleventh edition. London, 1887.
Malone's Criminal Briefs Baltimore, 1886.
May on Fraudulent Conveyances. Second edition. London, 1887.
Miller & Hodgins' Year Book, University of Toronto. 1887.
Murfree on Sheriffs. St. Louis, 1884.
Pike's History of Crime in England. London, 1873.
Pollock on Torts. London, 1887.
" Philadelphia, 1887.
Pomeroy's Equity Jurisprudence. San Francisco, 1881.
Potter on Road and Roadside. Boston, 1886.
Preble on Collisions in U. S. Waters. Boston, 1386.
Rogers' City Hall Recorder. Six vols. New York. 1816-21.
Roscoe's Law of Light. Second edition. London, 1886.
Sichel's Practice Relating to Witnesses. London, 1887.
Smith's Common Law. Tenth edition. London, 1887.
Snell's Equity. Eighth edition. London, 1887.
Taylor's Landlord and Tenant. Eighth edition. Boston, 1887.
Tiedman's Limitations of Police Power. St. Louis, 1886.
United States, Revised Stat. of. Second edition. 1873-74. Washington, 1878.
United States Supplements. Washington, 1881.
Wharton's International Law Digest. Washington, 1886. D.

FLOTSAM AND JETSAM.

MUSICAL ANNOYANCES.—The large number of persons who, without being particularly sensitive or particularly nervous, suffer extreme annoyance from the popular performances of brass bands, barrel organs, steam trumpets, etc., will be much interested in a case which came recently before Mr. Justice Kekewich. The plaintiff was Mr. S. Winter, living at Brentwood, Essex, who claimed from the court an injunction to restrain the defendants from using a yard at the back of some model lodging houses for shows, which included steam circuses and organs, swings, rifle-shooting galleries, and all the noisy accompaniments of country fairs, prominent among which was a steam organ with twenty-seven trumpets. Evidence was given respecting the nuisance caused by the performances, and, without calling for a reply, Mr. Justice Kekewich delivered judgment in favour of the plaintiff, granting the injunction prayed for, and declaring the two defendants—Mr. Baker (the occupier of the yard), and Mr. Davies (the *entrepreneur* of the shows)—liable to pay the costs of the action. Setting aside the rifle-shooting, and the swings, as not necessarily nuisances if properly conducted, the learned judge said that the noise of the organ was rightly objected to, inasmuch as it was worked from six to ten every evening, except Saturday, when the time was still further extended. This loud and continuous playing necessarily interfered with the comfort of the neighbours, who were not over sensitive or fastidious, but wished merely to live like ordinary English people.

The organ playing was a distinct nuisance, entitling the neighbours to complain. With regard to the noise of the assembled crowd who came to be amused with swings and roundabouts, it was almost inevitable that they would shout; there was, as laid down by the learned judge, nothing improper in their so doing, but it could not be permitted to interfere with other persons' comfort. The nuisance was proved, and the plaintiff was entitled to the injunction he asked for against the proprietor of the shows. Then came the question as to the liability of the proprietor of the yard in which the show was held. A man, said Mr. Jus-

tice Kekewich, was not generally liable for nuisance committed by his tenant; but Mr. Baker was a party to these nuisances, for he had let the yard knowing it was to be used for the shows, and after it had been let one week he let it a second time, being aware of the use that had been made of it on the first occasion.

The decision in this case is one which will be received with great satisfaction by all peace-loving people. It is only those whose residence has been within a quarter of a mile of a show of the same description as that so summarily put down by the injunction granted by Mr. Justice Kekewich, who can fully appreciate the effect of the maddening discord of a country show, with its roundabouts and organs worked by steam, and the shouts of those who are participating in the entertainment.

No right-minded persons would wish to interfere with the enjoyment of the people; but that that enjoyment should be purchased at the sacrifice of the comfort of others is not to be tolerated, and it is most satisfactory to know that outrages on the peace and quietude of a neighbourhood can be at once stopped by an injunction, and that the costs of the proceedings will fall on those who have for their own selfish ends disturbed the inhabitants of a district, and rendered the lives of the residents almost unendurable by their blatant discord.—*The Queen*, London, England.

SIR HENRY HAWKINS is getting a reputation for wit. Recently a prisoner pleaded guilty of larceny, and then withdrew the plea and declared himself innocent. The case was tried, and the jury acquitted him. Then said Sir Henry: "Prisoner, a few minutes ago you said you were a thief, now the jury says you are a liar, consequently you are discharged."

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. SEPTEMBER 1, 1887. No. 15.

DIARY FOR SEPTEMBER.

1. Thur.....Sittings of Divisional Court Chancery Division H. C. J. begin. Long vacation ends.
3. Sat.....Sir Edward Coke died 1634, æt. 82.
4. Sun.....*13th Sunday after Trinity.*
5. Mon.....Trinity Term of L. S. begins.
6. Tues....Sittings of Court of Appeal begin.
9. Fri.....Revolted American Provinces first called "the United States," 1776.
11. Sun.....*14th Sunday after Trinity.*
12. Mon.....Frontenac Governor of Canada, 1692.
13. Tues....Quebec taken and death of Wolfe, 1759. C. C. sittings for trial in York.
14. Wed....Duke of Wellington died 1852. Sir J. S. Copley (afterwards Lord Lyndhurst) appointed Master of the Rolls, 1826.

TORONTO, SEPTEMBER 1, 1887.

As yet there is no definite information as to the appointment to the vacant Chief Justiceship. The long vacation is at an end, and in a few days work will begin again in earnest, and delay in making the appointment is likely to be prejudicial to the public interest. Whoever may be selected to fill the vacant post we earnestly hope that the exigencies of the public, and not of party, may prevail.

A CONSOLIDATION and amendment of the rules of practice, we believe, is in contemplation, and we trust that the work may be carefully and thoroughly done so that it may last without tinkering for a few years at least. Any undue haste or want of care in such a matter is sure to be dearly paid for in the long run by the public.

LAW SOCIETY.

RESUME OF PROCEEDINGS.

Special meeting of Convocation, called upon requisition to consider the action to be taken in view of the contemplated alteration in practice and procedure in the High Court of Justice.

WEDNESDAY, 23RD MARCH, 1887.

Present—Messrs. Beaty, Bell, Falconbridge, Ferguson, Foy, Hoskin, Irving, Kerr, Maclennan, Martin, McMichael, Murray, Osler, Purdom, Robinson, and Smith.

In the absence of the Treasurer, Mr. Irving was elected chairman.

A letter was read from Mr. Walter Barwick, Secretary of the York Law Association, enclosing the resolution of a joint committee, composed of members of the Wentworth and York Law Associations, which letter was as follows:

THE COUNTY OF YORK LAW ASSOCIATION,
TORONTO, 21st March, 1887.

The Secretary of the Law Society, Toronto:

DEAR SIR,—The Commissioners engaged in the revision of the Statutes furnished several of the County Law Associations with copies of the proposed Rules of Procedure, with a request for suggestions thereon.

The Associations of Elgin, Middlesex, Wentworth and York, have given a good deal of consideration to these rules, and on the 15th March a deputation from the Committee on Legislation of the Wentworth Law Association met with a deputation from a similar Committee of the York Law Association in Joint Committee for the purpose of considering these rules.

The Commissioners were waited upon, and it was represented to them how impossible it was to give any proper consideration to the draft rules within the limited time afforded to the Committee, and the Commissioners agreed to postpone the consideration of the rules if the Joint Committee would undertake to frame suggestions with regard to the rules after proper consideration.

This undertaking was given.

The Joint Committee are agreed in the general principles to be adopted in framing the new rules, and at the meeting mentioned adopted the suggestions, a copy of which is enclosed.

The Committee are of the opinion that the suggestions to be made to the Commissioners should take the form of a proposed code to supersede and be substituted for all existing rules relating to practice and procedure; and that a competent member of the profession should be employed by the Committee to frame and put into proper form and shape the general suggestions agreed upon by the Committee of the Associations.

The employment of such assistance will necessarily entail expense, and the Joint Committee desire to procure from the Law Society a grant to be expended under the direction of the Committee in the preparation of such a code.

I am, sir, yours, etc.,

(Sgd.) WALTER BARWICK,
Sec. Joint-Com.

COPY OF RESOLUTION.

At a meeting of the Joint Committee on Legislation of the Law Associations of the Counties of Wentworth and York held in Toronto on the 15th day of March, 1887,

It was resolved,

That it is advisable to bring about a complete fusion of the three divisions of the High Court of Justice.

That one judge should sit in each week for the disposal of all business of the High Court required to be done in court and in chambers, without regard to the division in which the actions are pending.

That a uniform practice should be adopted in all the divisions of the High Court, including therein the practice at the sittings of the various Divisional Courts.

That there should be not less than four sittings held at permanent and fixed dates in each county for the trial of jury and non-jury cases, at two of which jury cases shall be tried as may be determined by general rules of the court.

That the tariff of costs be amended so as to allow the deputy clerks of the Crown, local masters and local registrars, as local taxing officers, to tax increased counsel fees with briefs at trials, or on assessments, to a sum not exceeding $40 to senior counsel and $20 to junior counsel, in actions of a special and important nature, provided that J. H. Thom, Esq., Taxing Officer, shall have power to tax increased fees; provided that if the application be made in the first instance to the said local officials for fiats, no application shall thereafter be made to the said taxing officer.

That the foregoing suggestions be enacted and adopted as rules forthwith; but the consideration and re-enactment of the proposed consolidation of the rules of practice and procedure as set forth in the printed draft thereof now under consideration by the judges, be postponed so as to enable proper consideration to be given to them, the Committee being of opinion that such rules should wholly supersede and be substituted for all existing rules relating to practice and procedure; and that in view of the great importance of these rules, application should be made to the Law Society to call a special meeting at an early day to consider what action should be taken to enable this Committee to procure a carefully prepared and efficient code of rules of practice and procedure in all the courts.

And it was further resolved that the Law Society should be requested to take into consideration the subject of the increase of judicial salaries, and make such representations as they may deem advisable to the proper authorities with a view of having suitable increases made.

On these documents being read, Mr. Walter Barwick, Secretary of the York Association, who was in attendance, was invited to attend before Convocation.

After discussion it was ordered,

That the sum of two thousand dollars ($2,000) be placed at the disposal of such members of the Joint Committee on Legislation of the Counties of York, Wentworth and Middlesex, as may be members of Convocation, for the purpose of obtaining such assistance as they may deem necessary, in order to assist them in making such suggestions as they deem advisable in drafting and perfecting the proposed code.

Resolved, That in the opinion of Convocation the salaries of the judges of the Supreme Court of this Province should be substantially increased, and that the Joint Committee on Legislation of the Counties of York, Wentworth and Middlesex, be requested to take steps forthwith to confer with the Governments of the Dominion and Ontario with the object of obtaining such suitable increase.

Convocation adjourned.

EASTER TERM, 1887.

The following is a *résumé* of the proceedings of Convocation during Easter Term and of the 28th June, 1887 :

The following gentlemen were called to the Bar during Easter Term, 1887, viz.:

May 16.—William Field Kerr, Richard Henry Collins, Alexander Cecil Gibson, Clarendon Ivan Theodore Gould, Alonzo Edward Swartout, James Archibald Macdonald, Hugh Hornby Langton, Stanly Clark Warner, Angus William Fraser, William Henry Frederick Holmes, John Shaw Skinner, John Frederick Cryer, John Lyons Peters, William Kenneth Cameron, Alexander A Mactavish, Edward Malcolm Young, Ernest William Morphy, George Albert Loney.

May 17.—Herbert James Dawson, John Henry Bobier, Alfred Buel Cameron, John Elliott.

The following gentlemen were granted Certificates of Fitness as solicitors, viz.:

May 16.—R. A. Dickson, W. F. Kerr, S. C. Warner, F. M. Field, J. H. Bobier, H. B. Smith, G. F. Bell, J. Campbell, A. Dods, C. I. T. Gould, E. Heaton, J. Elliott, G. W. Field, W. H. F. Holmes.

May 17.—T. Urquhart, A. W. Marquis, J. Vance, J. A. Davidson, R. U. McPherson, E. M. Young, A. C. Gibson, J. F. Cryer, E. W. Morphy, J. A. Macdonald, H. H. Langton, J. Clark.

May 21.—A. A. Mactavish.

June 4.—R. H. Collins, A. E. Taylor.

June 28.—F. N. Raines.

The following gentlemen passed the First Intermediate Examination, viz.:

W. J. Hatton, honors and first scholarship; and Messrs. J. H. Denton, C. Styles, T. J. Mulvey, M. Murdoch, G. H. Cowan, W. G. Bain, R. V. Clement, A. J. Forward, C. Swabey, W. G. Richards, A. G. Browning, F. C. Hastings, D. M. Robertson, D. T. K. McEwan, R. E. Fair, I. Newlands, R. W. Smith, G. N. Beaumont, J. W. Evans, J. H. McArthur, W. J. Williams, G. S. McCarter, A. M. Macdonell, R. Baldwin, W. L. Beales, E. S. Brown, M. K. Cowan, A. J. McDonald, R. Segsworth.

The following gentlemen passed the Second Intermediate Examination, viz.:

J. A. McLean, C. Horgan, D. L. Sinclair, E. M. Lake, F. H. Kilbourne, W. W. Osborne, J. A. Macdonald, J. G. Holmes, W. W. Vickers, G. Hunter, J. F. Dumble, T. Walmsley, W. E. Hastings, E. H. Britton, W. C. Chisholm, J. B. Lucas, W. Lawson, J. H. Macnee, S. W. Burns, E. D. Cameron, J. F. Wills, H. V. Lyon, E. S. Wigle, J. G. Gauld, W. H. Stafford, G. F. Cane, A. D. Cartwright, H. W. Church, J. W. Coe, J. Fraser, S. R. Wright.

The following gentlemen were admitted into the Society as Students-at-Law:

Graduates—A. Nugent.

Matriculants—V. M. Hare, G. D. Minty,

Juniors.—E. N. Livingston, A. W. Ballantyne, Z. H. Gallagher, W. S. Middlebrough, W. J. Clark, H. B. McGiverin, W. M. Shaw, T. L. W. Porte, U. A. Buchner, W. H. P. Walker, F. C. Jones, B. E. Swayzie, J. Steele, W. A. Boys.

The following gentlemen were admitted as Students-at-Law in the Graduate Class on the 28th June, their admission to date as of the first day of Easter Term, 1887. (See Rule 29th May, 1885.)

W. J. Kidd, W. A. Logie, C. W. Kerr, J. R. L. Starr, F. L. Webb, A. Crozier, W. H. Hunter, W. McBrady, A. H. O'Brien.

MONDAY, 16TH MAY.

Convocation met.

Present—The Treasurer, and Messrs. Beaty, Falconbridge, Foy, Hoskin, Lash, Maclennan, McCarthy, Morris, Moss, Murray, Osler, Purdom, Robinson.

The minutes of the last two meetings were read, approved and signed by the treasurer.

Mr. Moss, from the Committee on Legal Education, reported on the petition of Thomas Reid, asking for an award of a scholarship for the Second Intermediate Examination of last Term, recommending that under the rule in that behalf he be allowed his Second Intermediate Examination with honors, and receive the second scholarship of last Term.

Ordered for immediate consideration, and adopted and ordered accordingly.

Mr. Hoskin, from the Committee on Discipline, reported on the case of Mr. A. D. Kean, referred to them.

The report was received, read and ordered to be taken into consideration tomorrow.

Mr. Murray, from the Select Committee on the subject of students' text-books, presented their report, which was read and received.

Ordered to be considered on Saturday, the 21st instant.

The annual Report of the Examiners of the Law School was read.

The petition of Richard Reynolds, complaining of a solicitor, was read and received.

Ordered, that the petition be referred to the Committee on Discipline to report whether there is a *prima facie* case for enquiry.

The letter of Mr. J. H. Greenwood as to jubilee call, was read.

Ordered, that Convocation does not think fit to take any action on the said letter.

The letter of Mr. Walter Barwick, from the Committee on Legislation of the Law Associations, was received and read.

Ordered to be considered to-morrow.

The letter of Mr. L. H. Baldwin was received and read.

Ordered, that it be brought up on Saturday with the report on students' text-books.

Mr. Beaty, from the Select Committee on Honors and Scholarships, presented their report, which was received, read, ordered for immediate consideration and adopted.

Ordered, that W. J. Hatton be allowed his First Intermediate Examination with honors, and do receive a scholarship of one hundred dollars.

Convocation adjourned.

TUESDAY, 17TH MAY.

Convocation met.

Present — Messrs. Britton, Cameron, Falconbridge, Foy, Guthrie, Hardy, Hoskin, Irving, Lash, Mackelcan, Maclennan, Martin, McCarthy, Morris, Murray, Osler, Purdom, Robinson, Smith.

In the absence of the Treasurer, Mr. Irving was elected chairman.

The minutes of the last meeting were read, approved and signed by the chairman.

Mr. Irving being called away, Mr. Osler was appointed to the chair *pro tem.*

Mr. Hoskin brought up the report of the Committee on Discipline, in the case of a solicitor on the complaint of the Trustees of the Toronto General Hospital, that a *prima facie* case had been made out.

The report was adopted, and the matter was referred to the Discipline Committee under the statute and rules for investigation and report.

Ordered, that a call of the Bench be made for the last Saturday of the present Term (the 4th June next), for the purpose of electing a Bencher to fill the vacancy occasioned by the elevation of Thomas Robertson, Q.C.

There being present not less than fifteen members of the Bench,

Mr. Hoskin read the report in the case of Mr. A. D. Kean, and after consideration, on motion that the report be adopted, it was

Ordered, that Convocation having at its last meeting received the report of the Discipline Committee, respecting the charges made against Mr. A. D. Kean, and having ordered that the same be considered to-day, it is ordered that the consideration thereof be postponed until Saturday, the 4th day of June, and that a call be made of the members of the Bench for that day; that notice of this order be given to Mr. Kean, and that a copy of the report be forwarded to him to the intent that he may shew to Convocation any cause that he may have why the conclusion arrived at by the Discipline Committee should not be adopted by Convocation.

Mr. Osler being called away, Mr. Maclennan was called to the chair.

Ordered, that in case Mr. Kean should desire it, the evidence in his case be printed at the expense of the Society, and a copy sent to each Bencher and to the complainant and the accused, in due time before the day appointed for the consideration of the report.

Ordered, that all unfinished business of the day do stand adjourned till Saturday next.

Convocation adjourned.

SATURDAY 21ST MAY.

Convocation met.

Present—The Treasurer, and Messrs. Falconbridge, Foy, Irving, Moss, Murray, Osler, Robinson.

The minutes of last meeting were read and approved.

Mr. Blake was elected treasurer for the current year.

On motion of Mr. Irving, ordered, that the following be the list of the Standing Committees for the ensuing year, viz.:

FINANCE.

Messrs. S. H. Blake, W. G. Falconbridge, J. J. Foy, Æ. Irving, Z. A. Lash, E. Martin, T. H. Purdom, L. W. Smith, H. W. M. Murray, chairman.

LIBRARY.

Messrs. J. Beaty, S. H. Blake, H. Cameron, J. H. Ferguson, D. McMichael, J. H. Morris, Charles Moss, C. Robinson, Æ. Irving, chairman.

REPORTING.

Messrs. B. M. Britton, H. Cameron, W. G. Falconbridge, F. Mackelcan, E. Martin, D. McCarthy, H. W. M. Murray, B. B. Osler, James Maclennan, chairman.

LEGAL EDUCATION.

Messrs. J. H. Ferguson, J. Hoskin, Z. A. Lash, F. Mackelcan, W. R. Meredith, J. H. Morris, B. B. Osler, C. Robinson, Charles Moss, chairman.

DISCIPLINE.

Messrs. A. Hudspeth, J. K. Kerr, F. Mackelcan, J. Maclennan, D. McMichael, Z. A. Lash, C. Robinson, L. W. Smith, J. Hoskin, chairman.

JOURNALS AND PRINTING.

Messrs. John Bell, B. M. Britton, J. J. Foy, C. F. Fraser, J. Hoskin, D. McCarthy, Chas. Moss, T. B. Pardee, J. K. Kerr, chairman.

COUNTY LIBRARIES AID.

Messrs. B. M. Britton, H. Cameron, D. Guthrie, A. S. Hardy, A. Hudspeth, J. K. Kerr, W. R. Meredith, Z. A. Lash, E. Martin, chairman.

Mr. Moss presented the report of the Legal Education Committee on the case of R. U. McPherson, that his papers are now complete, and that he has duly served his time and is entitled to his Certificate of Fitness.

Ordered for immediate consideration, and adopted and ordered accordingly.

Ordered, that it be referred to the Discipline Committee to frame and submit to Convocation on the first day of next Term the draft of legislation thought advisable to perfect the machinery for enquiring into complaints against persons under the jurisdiction of Convocation, and also to persons untruly holding themselves out as solicitors or barristers, or evading the regulations as to practice.

On the order of the day for the petition on the subject of the jubilee, it was

Ordered, that the consideration of the petition do stand adjourned till Friday next.

The report of the Select Committee on the subject of students' books was taken into consideration.

The report was considered paragraph by paragraph, amended, adopted, and is as follows:

REPORT.

To the Benchers of the Law Society in Convocation:

The Special Committee to whom was referred the subject of text books for students in connection with the County Law Library Associations and of students' books generally, beg leave to report as follows:

They have had under consideration the above subject, having regard to the following rule and resolution of Convocation:

(Rule 142, paragraph 13, Dec. 4, 1886.) Convocation may furnish to each library such number of books for the use of students as may be required; the books so furnished to be kept by the librarian of each association, and students allowed to use the same on similar conditions to those in force from time to time in regard to similar books at Osgoode Hall.

Ordered, that Mr. Kittson's letter, in so far as it refers to students' books, be referred to a special committee, consisting of the Finance Committee and Messrs. Moss, Meredith, Britton and McMichael, to report to Convocation upon the subject, together with the system to be adopted to carry out the rules of Convocation, relating to students' books for county libraries; and further, to report to Convocation upon rules to be observed by students on the occasions of obtaining

and borrowing students' books. (18th February, 1887.)

The Committee find that there are two county libraries having fifty members, viz.: Wentworth and Middlesex; that the number of students using books in Wentworth is about thirty, and in Middlesex between forty and fifty; and that the price of one complete set of books is about $190.

1. That subject to the hereinafter mentioned rules, the Committee recommend that one complete set of students' books be supplied to each library association having at least fifty members, but that the renewal of such set or making good losses in the books be assumed by the library associations.

2. That each application be dealt with according to the circumstances thereof, and as the same is presented, that no settled rule be laid down.

3. That in places where there is no library association, or where there is an association but the number of members is less than fifty, students be allowed to apply to the secretary of the Law Society and receive books from him, subject to the same rules as students are who reside in the city of Toronto.

4. That the Wentworth and Middlesex Library Associations be at once supplied with one complete set of students' books.

5. That the rules as to lending books, whether from Osgoode Hall or from a county library, be as follows:

RULES.

The text books prescribed for the various law examinations will be loaned to students and articled clerks on the following conditions:

1. Every student or clerk, at the time of his first application, must file with the librarian of the library in question, a certificate (on prescribed form) signed by the solicitor in whose office he is, to the effect that he is a fit and proper person to be entrusted with the books, and must also deposit with the treasurer of the library in question the sum of ten dollars as security for the due return in good order of the book borrowed.

2. No book shall be retained by a student or clerk longer than one month. If retained longer than this period a fine of ten cents a day shall be exacted for each subsequent day.

3. No book shall be reserved for any student or articled clerk.

4. No student or clerk shall be entitled to more than one volume at a time.

5. No book shall be borrowed by the same person more than twice within six months.

6. Any student or clerk who shall injure, destroy, or lose any of the books of the Society shall forthwith make good the damage.

7. Books defaced with marks or writing shall be considered as injured, and assessed for accordingly.

8. No book shall be considered as returned by any student or clerk, unless it is handed to the librarian or to an assistant in the library, and its return duly entered in the proper book.

9. Students or clerks are prohibited from lending the books, or exchanging them with others.

10. Every student or clerk must give a receipt for every book loaned to him.

11. The librarian shall report to Convocation any student or clerk who removes any books from Osgoode Hall, or from any county library, except in accordance with these rules.

12. When a student or clerk notifies the librarian that he does not intend to apply for more books, the amount of his deposit shall be repaid to him, less fines and damages under these rules.

The letter of Mr. L. H. Baldwin, as to lending of books on the University curricula to members of the Society, was considered, and it was ordered that the existing order as to loaning books to students in connection with the courses of the Universities be extended to the members of the Bar.

It was further ordered that the regulations for lending of students books this day adopted be applicable to the cases of students and members of the Society borrowing books in connection with the University courses.

Ordered, that the secretary do cause to be published the usual advertisements for four gentlemen to fill the positions of examiners and lecturers, the applications to be in the secretary's hands not later than the 2nd day of June.

Ordered, that a call of the Bench be made for Saturday, the 4th day of June, for the appointment of four examiners and lecturers.

Convocation adjourned.

FRIDAY, 27TH MAY.

Convocation met.

Present—Messrs. Ferguson, Foy, Irving, Lash, Mackelcan, Maclennan, Meredith, Morris, Moss, Murray, Osler, Robinson.

In the absence of the Treasurer, Mr. Irving was elected chairman.

The minutes of the last meeting were read, approved, and signed by the chairman.

Mr. Murray, from the Reporting Committee, presented the report of that Committee, which was received, read and ordered for immediate consideration.

Ordered, that the editor-in-chief be informed that Convocation is of the opinion

that the digest number of each volume should be published within six weeks after the issue of the reports of that volume, and that the Committee be requested to inform Convocation of the reasons, if any, for the delays in the reports of the Appeal and Chancery Divisions; and that so much of the report as relates to the recommendation of the Committee to increase the salary of the Practice Court reporter from $600 to $900 per annum, the increase to take effect from 1st July next, be adopted.

Mr. Osler gave notice of a motion for Saturday, 4th June, to introduce a rule to alter the rule as to reporters' salaries, so as to give effect to the recommendation in the report.

A letter was read from the Canadian Pacific Telegraph Company, applying for permission to introduce the wires of their company into Osgoode Hall.

The letter was referred to the Finance Committee with power to act.

A letter from Mr. S. S. Macdonell was read, asking that his certificate to practice for 1887, which had never been sent to him, might be cancelled, as owing to his official position he had abandoned all intention of resuming practice.

Ordered, that his certificate be cancelled and his money returned to him, less any Term fees that might be due from him to the Society.

A letter was read from Mr. Macdonald of the Guelph Law Association.

Ordered, that the publishers be directed to send to the Guelph Law Association the back numbers of the volumes of the reports current at the time of the formation of that Association.

The petition from the members of the Bar of Ontario in reference to the fiftieth anniversary of Her Majesty's accession to the throne, presented to Convocation on 12th February last, and which stood over from previous meetings of Convocation, was considered, and it was deemed expedient that no action be taken thereon.

Mr. Morris gave notice that he would, at the next meeting of Convocation, move that an humble address be presented by Convocation to Her Majesty the Queen, congratulating Her Majesty on having reached the semi-centennial period of her reign.

Convocation adjourned.

SATURDAY, 4TH JUNE.

Convocation met.

Present—Messrs. Beaty, Britton, Falconbridge, Foy, Fraser, Hoskin, Irving, Kerr, Lash, Mackelcan, McCarthy, Morris, Moss, Murray, Osler, Pardee, Robinson, Smith, Maclennan.

In the absence of the Treasurer, Mr. Irving was elected chairman.

The minutes of the last meeting were read and confirmed.

Mr. Maclennan, from the Reporting Committee, read the following report.

The Committee on Reporting beg leave to report as follows:

1. The delay in the Chancery Division rests with Mr. Lefroy, who acknowledges that it is due to press of other work. He has, however, exerted himself to the utmost, and now states that eleven of the seventeen unreported cases are now ready to issue, and that with one exception this will clear off all cases to the 1st March. The Committee have an assurance from Mr. Lefroy of increased diligence hereafter.

2. The delay in the issue of the digest to volume 12, Ontario Reports, was caused in great part by the accidental omission of the matter of one of the numbers in preparing the index in the first instance, and also partly by the delay of the printer. Your Committee believe that the indexes will be issued more promptly in the future.

3. The serious arrears in the Court of Appeal appear to be without any excuse, and your Committee recommend that the reporter ought at once to avail himself of the arrangement with Mr. Brown, made some time since to bring up the arrears, but which it is understood has never been acted on up to the present time.

4. Your Committee recommend that 1000 copies of Mr. Cartwright's Digest of Constitutional Cases be ordered in sheets at the price of $1.50, provided reference is made in such Digest to the cases as reported in the regular reports as well as in Mr. Cartwright's own volume.

All of which is respectfully submitted.

The report was taken into consideration and adopted.

Ordered, that the Reporting Committee be authorized to take such immediate steps as they may deem necessary to have

the arrears of the Appeal reports brought up, and to prevent arrears in the future; and for that purpose, if necessary, to direct the suspension of the reporter's salary, and to require the employment of assistance by the reporter or themselves to employ such assistance or other means at the reporter's expense as they may deem necessary.

A letter from Alfred Baker, Registrar of Toronto University, was read as follows:—

REGISTRAR'S OFFICE, June 4th, 1887.

SIR —At a meeting of the Senate of the University of Toronto, held May 27th, it was resolved that the Senate should invite the Law Society of Upper Canada to co operate with it in considering the question of the establishment of a Teaching Faculty in Law in the University, and I am directed to ask you to lay this communication before the Law Society at its next meeting. Your obedient servant,

ALFRED BAKER, *Registrar*

Ordered, that the following members of Convocation be a Committee to confer with the Senate of the University of Toronto on the subject of the establishment of a Teaching Faculty in Law in the University and report to Convocation, viz.:—Messrs. Falconbridge, Foy, Guthrie, Hardy, Irving, Kerr, Lash, Mackelcan, Martin, McCarthy, McMichael, Morris, Moss, Osler, Purdom and Robinson.

A letter from Messrs. Shilton, Allan and Baird was read, and referred to the Discipline Committee.

A letter from Philip Holt was read, on the subject of the election of a Bencher.

In the matter of the complaint against A. D. Kean, a barrister, on the report of the Committee on Discipline being brought up for further consideration,

Ordered, that charge four be considered as not sustained.

Mr. Kean was called upon to show cause to the report, and attended accompanied by his counsel, Mr. Lount, Q.C., and Mr. E. Douglas Armour. On hearing Mr. Lount, counsel for Mr. Kean, at length,

Ordered, that Convocation having considered the evidence reported upon the charges made against Mr. A. D. Kean, and having heard counsel for the said A. D. Kean, it is resolved that the evidence so reported fully justified the presentation of the charges preferred against Mr. Kean. But Convocation is of opinion that the circumstances do not warrant the conclusion that Mr. Kean should be disbarred. In the opinion however of Convocation, the admissions made by Mr. Kean establish that his conduct is censurable, and that he ought to be censured by Convocation, and that he ought to be ordered to attend Convocation forthwith to be censured by the chairman.

Mr. A. D. Kean thereupon attended, and was censured by the chairman. Mr. Kean's counsel were present.

Mr. Moss, from the Committee on Legal Education, presented the report of the Committee on Applications for the appointment of examiners and lecturers.

The report was received and read.

All the candidates having received nominations,

Mr. P. H. Drayton was elected Examiner and Lecturer in Equity Jurisprudence.

Mr. R. E. Kingsford was elected Examiner and Lecturer in Commercial and Common Law.

Mr. E. D. Armour was elected Examiner and Lecturer in Real Property.

Mr. W. A. Reeve was elected Examiner and Lecturer in Criminal Law and Torts.

The order of the day for the election of a Bencher in the place of Thomas Robertson, Esq., Q.C., elevated to the Bench, was taken up. Mr. Alex. Bruce, Q.C., of Hamilton, was elected.

Mr. Bruce was placed on the Discipline and County Libraries Aid Committees in the place of Mr. Lash.

On motion of Mr. Morris, pursuant to notice, seconded by Mr. Murray,

Ordered, that an humble address be presented by Convocation to Her Majesty the Queen, congratulating Her Majesty on having reached the semi-centennial period of her reign; that such an address be transmitted through the regular channel, and that the treasurer, the chairmen of the respective Standing Committees and the mover, be a Special Committee to draft, engross and transmit such address.

A Rule to amend the last clause of Rule number 113, with reference to the salary of the Practice reporter was read a first and second time, and ordered for third reading 28th June instant.

Convocation adjourned.

TUESDAY, 28TH JUNE.

(Subject to confirmation at next meeting of Convocation.)

Convocation met.

Present—Messrs. Cameron, Foy, Hudspeth, Irving, Lash, Mackelcan, Maclennan, McMichael, Martin, Meredith, Morris, Moss, Murray, Osler, Robinson.

In the absence of the Treasurer, Mr. Irving was elected chairman.

Mr. Morris, from the Special Committee appointed to draft and forward an address to Her Majesty on the occasion of the completion of the fiftieth year of her reign, presented the report of the Committee—that the address had been prepared, and sent to the Secretary of State at Ottawa to be forwarded to Her Majesty.

The report was read and adopted.

The petitions of Messrs. J. D. Montgomery and T. C. Robinette were received and read, and the prayer granted.

The letter of Mr. Walter Barwick of this date was read as follows:

TORONTO, 28th June, 1887.

J. H. Esten, Esq., Secretary of the Law Society:

SIR.—At a meeting of the Bar held yesterday, presided over by the Attorney-General, a Committee was appointed to draft an appropriate resolution upon the subject of the death of the Honorable Sir M. C. Cameron.

The following motion was also passed at the meeting, "That Convocation be requested to have the resolution to be prepared by the Committee engrossed on the minutes of the Law Society, and that a copy of such resolution be forwarded to the family of the late Chief Justice."

I am, sir, yours, etc.,

WALTER BARWICK,
Sec. of the Meeting.

And the resolution of the Bar therein as follows:

RESOLUTION.

The profession have assembled in consequence of the death of the Honorable Sir Matthew Crooks Cameron, which took place on the 25th inst.

After practising at the Bar for thirty years he was, in the year 1878, made a Judge of the Court of Queen's Bench, and afterwards in the year 1884 was appointed Chief Justice of the Common Pleas Division, which distinguished position was held by him until his death.

He sat in the Legislature of the late Province of Canada and of this Province, and for a period of four years was a member of the Executive Council of Ontario as Provincial Secretary and Commissioner of Crown Lands.

He was distinguished as an advocate, a judge and a representative of the people, by singular individuality and independence of character, and by fearlessness in giving expression to his convictions when he believed himself in the right, he compelled the respect alike of his friends and opponents.

As an advocate he was forcible and courageous, as a judge impartial and patient, as a politician it is believed the rectitude of his motives were never questioned even by those opposed to him. His private virtues and his public life may well be taken as examples for all.

The imperial honor so recently bestowed upon him has rarely fallen on one who more truly embodied the best characteristics of the chivalry of old.

The Bar feel that as their body has been honoured by his life, so they and his native Province have lost by his death one who was the very type of those best qualities which mark the high-minded man, the honest politician and the successful advocate.

Ordered, that the resolution of the meeting of the Bar be entered on the proceedings of Convocation; and further, that an engrossed copy thereof be transmitted to the family of the late Sir Matthew Crooks Cameron.

A letter from A. Clark, of Orillia, dated 9th June, in *re* A. D. Kean, was read, and also the charge of W. H. Barker against A. D. Kean.

The secretary reported that he had written to Mr. Clark in reply to his letter.

Ordered, that the charge of Mr. W. H. Barker is too vague and indefinite for Convocation to take any notice of.

The letter of Mr. Goodwillie was read in reply to the enquiry as to what he had to say to the complaint that he was advertising himself as a barrister when he was a solicitor only.

The secretary was directed to write to him calling upon him to give an explanation of his calling himself a barrister, and repeating the cause of complaint in his letter, and to inform him that his communication is unsatisfactory.

A letter was read from Mr. Fowler, Secretary of the Lawn Tennis Club, in reference to a supply of water for their dressing-room.

The letter was referred to the Finance Committee with power to deal with it.

A letter was read from Mr. French in reference to the establishment of a mutual benefit association by the members of the profession.

Ordered, that Mr. French be informed that the subject of his letter was not new to Convocation, but that Convocation had hitherto not deemed it advisable to act.

The secretary reported that Mr. L. H. Dickson, of Exeter, who is a solicitor only,

advertises himself as a barrister, and produced the advertisement.

Ordered, that it be referred to the Discipline Committee.

Mr. Moss, from the Committee on Legal Education, presented the report of that Committee with reference to the admission of graduates. (For names of candidates admitted see list at beginning of résumé.)

The report was received, considered and adopted.

Mr. Martin presented the report of Mr. Winchester, Inspector of County Libraries.

The Rule relating to the salary of the Practice Court reporter was read a third time and passed, and is as follows:—

The salary of the reporter for decisions in matters of practice shall be nine hundred dollars per annum ($900).

Convocation adjourned.

RECENT ENGLISH DECISIONS.

The *Law Reports* for July comprise 19 Q. B. D. pp. 1-150; 12 P. D. pp. 145-157, and 35 Chy. D. pp. 191-399.

Husband and wife—Separate estate—Post nuptial settlement — Restraint on anticipation — Contract by wife during coverture—Married Women's Property Act, 1882 (47 Vict. c. 19 [O.], s. 2, ss. 4, s. 17).

In *Beckett* v. *Tasker*, 19 Q. B. D. 7, a Divisional Court (Day & Wills, JJ.) was called on to decide a question under the Married Women's Property Act, 1882. By a post nuptial settlement made before 1882, property which had been devised to a married woman for her separate use without restraint on anticipation was limited to her for life for her separate use, without power of anticipation, remainder to the husband for life, or until bankruptcy, remainder to the children. The wife, after the Act of 1882, and during coverture, made a promissory note in favour of the plaintiffs, and after the death of the husband the plaintiffs obtained judgment upon the note, and the question for the Court was whether the plaintiffs were entitled to a receiver of the rents and profits of the property included in the settlement. The plaintiffs claimed that the restraint on anticipation was determined on the death of the husband, and that from that time the widow held the property as a *feme sole*, and that the settlement being post nuptial was void for want of consideration. But the Divisional Court (overruling Huddleston, B.) was of opinion that, apart from the question as to the validity of the settlement, the property covered by the settlement would not have been bound by the contract prior to 1882, and that the death of the husband would not have affected the liability of the wife under such a contract, and that the Act of 1882 had not altered the law in this respect. Notwithstanding the general words of s. 1, ss. 4 (47 Vict. c. 19 [O.], s. 2, ss. 4), which provides that "every contract of a married woman with respect to, and to bind her separate estate, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire," the court held that this merely includes property acquired during coverture, and does not include property acquired after the coverture. The validity of the settlement was upheld on the ground that the husband had no estate by the curtesy in the land settled, as no issue had then been born, and under the settlement he took an estate for life, whether there were children or not, which, on his part, he submitted should be determined on his bankruptcy. This case appears to be another instance of the astuteness which the courts have always displayed in construing the Acts relating to married women, so as to deprive them as far as possible of the beneficial effect the Legislature may be reasonably supposed to have intended them to have.

Naval officer—Resignation of commission.

The chief point decided by the court (composed of Lord Coleridge, C.J., Mathew, Cave and A. L. Smith, JJ.) in *The Queen* v. *Cuming*, 19 Q. B. D. 13, was that a commissioned officer of Her Majesty's navy who has accepted service on board of one of Her Majesty's ships, cannot, without leave of the Admiralty, resign his commission and retire from the service, and if he do, he is liable to be arrested and tried before a court martial as a deserter.

Carrier—Measure of damages—Delay in delivery of samples—Loss of season—Negligence.

Schulze v. *The Great Eastern Ry. Co.*, 19 Q. B. D. 30, was an appeal from Day, J. A par-

cel of samples was delivered to the defendants to be forwarded to the plaintiffs. By the negligence of the defendants who had notice that the parcel contained samples it was delayed on the way until the season at which the samples could be used in procuring orders had elapsed, and they had in consequence become useless. The plaintiffs could not have procured similar samples in the market. The action was brought to recover damages for the non-delivery of the samples in a reasonable time. The Court of Appeal held (affirming Day, J.) that the plaintiffs were entitled to recover as damages the value of the samples to them at the time they ought to have been delivered. Lord Esher, who delivered the judgment of the court, was of opinion that the case was governed by *Wilson* v. *Lancashire and Yorkshire Ry. Co.*, 9 C. B. N. S. 632.

BANKRUPTCY—REALIZATION OF ASSETS—INSURANCE OF DEBTOR'S LIFE—SUBMISSION TO MEDICAL EXAMINATION.

In re Betts, 18 Q. B. D. 39, is a bankruptcy decision of some moment. The principal asset of a bankrupt's estate was a contingent reversionary interest which could only be saleable if the bankrupt's life was insured. The question was whether the bankrupt could be compelled to submit to a medical examination, so as to enable the trustee to effect an insurance on his life, and whether his refusal to submit to such examination was misconduct. Lord Esher and Lopes, L.J., held that the bankrupt could not be compelled to such examination, and that his refusal to submit to the examination was not misconduct. But from this view Fry, L. J., dissented. The decision of Cave, J., *In re Garnett*, 16 Q. B. D. 698, was approved and followed by the majority of the Court of Appeal.

PRACTICE—SPECIALLY INDORSED WRIT—TIME FOR SERVICE—ORDER LXIV. (ONT. RULE 459).

In *Murray* v. *Stephenson*, 18 Q. B. D. 60, a Divisional Court, composed of Mathew and A. L. Smith, JJ., held that a specially indorsed writ is not a pleading within Ord. lxiv. (Ont. Rule 459), and service thereof may therefore be effected at any hour of the day.

ESTOPPEL—NEGLIGENT REPRESENTATION—WHARFINGER.

The Court of Appeal in *Seton* v. *Laforce*, 19 Q. B. D. 68, affirmed the decision of Denman, J., 18 Q. B. D. 139, which we noted *ante*, p. 64.

PRACTICE—INTERPLEADER—CHARGES OF SHERIFF SUBSEQUENT TO ORDER—APPEAL.

Goodman v. *Blake*, 19 Q. B. D. 77, was an appeal from a County Court on the question by whom the costs of a sheriff, subsequent to the granting of an interpleader, should be borne. The Court of Appeal held that the incidence of such charges is a question of law and therefore appealable; and on the merits, that a successful claimant is entitled to recover such costs from the execution creditor.

PRACTICE—APPEALS—STAY OF EXECUTION.

The short point decided by the Court of Appeal in *Hamill* v. *Lilley*, 19 Q. B. D. 83, was that when an appellant desires to stay execution pending an appeal from the Court of Appeal to the House of Lords, the application must be made solely to the Court of Appeal, and cannot properly be made either in chambers in the court of first instance, or to a Divisional Court.

MARINE INSURANCE—MUTUAL INSURANCE ASSOCIATION—PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL.

An important point of insurance law was discussed in *United Kingdom M. S. Assurance Association* v. *Nevill*, 19 Q. B. D. 111. T., who was manager and part owner of a ship, took out a policy with a mutual insurance association in respect of the ship, and thereby became a member of such association. It became necessary to levy an assessment on the members of the association in order to provide funds to meet losses. T. had become bankrupt, and the association sought to make N., who was also a part-owner of the ship, liable for the assessment payable by T. as an undisclosed principal of T. But the Court of Appeal (affirming Grove, J.) held that the effect of the articles of association and the policy, was to impose the liability for assessments on members only, and N. not being a member, he could not be sued for assessments as an undisclosed principal of T.

None of the cases in the Probate Division call for notice here.

TRADE MARK—FANCY WORD NOT IN COMMON USE.

Proceeding now to the cases in the Chancery Division we come to *Re Arbenz*, 35 Chy. D. 248, which was an application to register as a trade mark the word "Gem," as applied to air-guns manufactured by the applicant. Kay,

J., granted the application, but the Court of Appeal, finding on the evidence that the word "Gem," at the time of the application for registration, had become descriptive of a particular make of air guns, and not of the guns of the applicant exclusively, reversed the decision of Kay, J. Lindley, L.J., doubted whether the word "Gem" could in any case be registered as a trade-mark.

PRACTICE — COSTS — STAYING PROCEEDINGS FOR NON PAYMENT OF COSTS.

In re Wickham, Marony v. *Taylor*, 35 Chy. D. 272, a question which has once or twice recently been before our own court was considered by the Court of Appeal, and that is the power of the court to stay proceedings for non-payment of costs. It may be remembered that the Court of Chancery was accustomed to make such orders on the ground that the party making default was in contempt, and was not at liberty to take any proceedings against his opponent until the contempt was cleared. The Court of Appeal, however, have placed the jurisdiction to stay proceedings on a more reasonable footing, which may be gathered from the following passage from the judgment of Lindley, L.J., at p. 282:

> I agree that the non-payment of costs *per se* is not ground for staying proceedings, but there is a great distinction even now between actions, the costs of which come out of the estate, and ordinary actions in the Queen's Bench Division. It appears to me that under the present practice, whenever it can be shown that a person is proceeding vexatiously in not paying costs which he has been ordered to pay, the court has jurisdiction to stay the proceedings. This rule is, I think, applicable in all the Divisions of the Court.

PRACTICE—INFRINGEMENT OF PATENT—PARTICULARS OF OBJECTION TO PATENT.

Crompton v. *Anglo-American Brush Electric Light Co.*, 35 Chy. D. 283, was an action for the infringement of a patent. The defendant, by his statement of defence, denied the validity of the patent, and stated that the specification did not sufficiently describe the invention, and how it was to be performed. Further particulars having been ordered, the defendant repeated the objection, with the addition that the specification did not contain a sufficient direction to enable skilled workmen to make a machine having the advantages alleged by the inventor. Kay, J., having ordered further particulars, the Court of Appeal affirmed his order on the ground that if the defendant knew of a particular defect in the specification he ought to point it out, so that the plaintiff might not be taken by surprise.

PRACTICE—THIRD PARTY—DISCOVERY, RIGHT OF THIRD PARTY TO.

In *Eden* v. *Weardale Iron Co.*, 35 Chy. 287, the Court of Appeal reversed the judgment of Kay, J., on a point of practice. A third party had been notified by the defendant for the purpose of claiming indemnity against him, and an order had been made directing that the question of indemnity should be tried after the trial of the action, and that the third party should be at liberty to appear at the trial of the action, and oppose the plaintiff's claim so far as he was affected thereby, and for that purpose to put in evidence and cross-examine witnesses. Before the trial the third party applied to examine the plaintiff for discovery. Kay, J., conceiving himself bound by authority, refused the application, on the ground that the third party was not in the position of a defendant, although expressing a strong opinion that, but for the cases he referred to, the third party was entitled to discovery. The Court of Appeal overruled Kay, J., and granted the order.

ADMINISTRATION ACTION—REAL ESTATE—LIS PENDENS—PURCHASER PENDENTE LITE.

In *Price* v. *Price*, 35 Chy. D. 297, the doctrine of *lis pendens* is considered and discussed by Kay, J. The action was brought on 30th Dec., 1875, by one of two trustees of a marriage settlement against James Price and Nicholas Price as executors of their father, a deceased trustee, claiming payment by them of the trust fund of £1,000 alleged to have been received, and improperly retained, by their testator. The testator died in 1873, and by his will he specifically devised parts of his real estate to them respectively. The original statement of claim delivered on 2nd March, 1876, stated that the testator had received the £1,000, and claimed payment, but did not ask for administration. On 11th May, 1878, the plaintiff registered the action as a *lis pendens* against both defendants. On 26th March, 1879, an amended statement of claim was delivered, asking, in addition to the relief

formerly claimed, that if the defendants should not admit assets, then for administration of the real and personal estate of the deceased trustee. There was no averment that he had devised any real estate, and this was the only mention in the statement of the claim of the real estate of the deceased trustee. On 28th July, 1879, the writ was amended by claiming that the defendant, James Price, was also personally liable. On 20th March, 1880, judgment was awarded against the defendant, James Price, personally, and also for the administration of the real and personal estate of the testator. Subsequently, in 1881, inquiries were added as to the real estate specifically devised. Previous to the judgment, but after the registration of the *lis pendens*, viz., on 18th Nov., 1878, Nicholas Price mortgaged certain real estate specifically devised to him, and the question arose whether the plaintiff and other creditors were entitled to priority over the mortgagees. Kay, J., held that the debts of the plaintiff and other creditors not being a specific charge on the real estate, and there being no claim for administration in the action until after the mortgages had been given, the mortgagees were entitled to priority, and that the registration of the *lis pendens* did not affect their rights. We believe it has not been the general practice in this Province to register a *lis pendens* in administration suits, it has been assumed that all parties were bound by the administration judgment granted in chambers; but this case seems to indicate that the registration of a *lis pendens* is as necessary in such suits as any others in order to guard against the accrual of the adverse rights of purchasers *pendente lite*. This case also indicates the necessity of making all the specific devisees original parties, wherever resort is necessary to the land specifically devised. Under our recent Devolution of Estates Act, however, it will probably be found the executors alone sufficiently represent the realty, unless they have by conveyance or otherwise assented to the specific devises.

EASEMENT—IMPLIED GRANT—VENDOR—CONVEYANCING AND LAW OF PROPERTY ACT, 1881, 44 & 45 VICT. C. 41, S. 6, SS. 2, 4 (49 VICT. C. 20, S. 5, SS. 1, 2 [O.]).

Beddington v. *Atlee*, 35 Chy. D. 317, is a decision of Chitty, J., on a question of conveyancing. The owner (subject to a mortgage in fee) of a house and an adjoining lot first leased the house, then contracted to sell the vacant lot to the defendant, and afterwards contracted to sell the house, subject to the lease, to the plaintiff. The house and lot were first conveyed to the plaintiff, the mortgagee joining in the conveyance; afterwards the vacant lot was in like manner conveyed to the defendant. It was contended by the plaintiff that under the conveyance to him there was an express or implied grant of light to the house as it existed at the time of the sale, by which the owner of the vacant lot was bound. But Chitty, J., held that no such grant could be implied over land which the owner had previously contracted to sell to a third party, and that the section 5, ss. 1 & 2 of the Conveyancing Act, from which 49 Vict. c. 20, s. 5, ss. 1, 2 (O.) is adapted, did not apply.

MARRIED WOMEN'S PROPERTY ACT, 1870—REAL ESTATE—CONVEYANCE BY WIFE WITHOUT HUSBAND'S CONCURRENCE.

Johnson v. *Johnson*, 35 Chy. D. 345, is noteworthy as confirming the view taken by our own courts, that under the Married Women's Property Act, 1870, a married woman could not make a valid conveyance of real estate descended to her as a co-heiress without her husband's joining in the conveyance. Our later Act of 1884, however, has been held to have enabled her to convey alone.

WILL—CONSTRUCTION—GIFT OF RESIDUE TO CHILDREN OF NEPHEW, TO BE VESTED INTERESTS IN SONS AT TWENTY-FIVE, AND IN DAUGHTERS AT TWENTY-FIVE OR MARRIAGE—REMOTENESS.

Re Coppard, Howlett v. *Hodson*, 35 Chy. D. 350, turns on the construction of a will, whereby the testatrix gave a moiety of the residue of her estate to trustees for the benefit of the children of her nephew, to be vested interests in them; as to sons on their attaining twenty-five years of age; and as to daughters on their attaining twenty-five years, or being married before that age; and in case a daughter was married before that age, power was given to settle her share. Power was given to apply the income of an expectant share of any child, for its maintenance and education, and also to apply an expectant share for advancement in life. In case all the children of the nephew should die without taking a vested interest there was a gift over to the testatrix' brothers

and sister. The nephew had four children born before the testatrix' death, and three born after her death. All seven were infants. A daughter, one of the four, married under age. It was held by Stirling, J., that the four only were entitled to take, and that the daughter took a vested interest, which, at present, was one-fourth.

VENDOR AND PURCHASER — CONTRACT ABANDONED BY PURCHASER—DEPOSIT, FORFEITURE OF—DEFECT IN TITLE SUBSEQUENTLY DISCOVERED.

The case of *Soper* v. *Arnold*, 35 Chy. D. 384, was an action brought by a purchaser whose deposit had been forfeited on the ground of his having abandoned the contract, to recover such deposit because three years afterwards, on a re-sale of the property, an objection to the title had been taken which had been held fatal. But it was decided by Kekewich, J., following *Howe* v. *Smith*, 27 Chy. D. 89, that he was not entitled to succeed.

VENDOR AND PURCHASER — COMPENSATION—DELAY IN GIVING POSSESSION.

In *Royal Bristol Permanent Building Society* v. *Bomash*, 35 Chy. D. 390, it was held by Kekewich, J., that when a purchaser had been kept out of possession, and in consequence had lost a tenant, and the property had been damaged, after sale, by the removal of fixtures, the purchaser was entitled to compensation for the loss of a tenant, such damages being the amount of rent lost; and that he was also entitled to damages for the deterioration of the property.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

GEMMILL v. GARLAND.

The judgment of BOYD, C., 12 O. R. 139, affirmed.

DAVIS v. LEWIS.

The judgment of the Q. B. Division, 8 O. R. 1, affirmed.

GOLDSMITH v. THE CITY OF LONDON.

An appeal by the defendants from the judgment of the Q. B. Division, 11 O. R. 26, was dismissed, by reason of the judges of this court being divided in opinion.

MILLER v. CONFEDERATION LIFE ASSURANCE CO.

Insurance—Contract—Warranty of truth of answers by insured—New trial—Discovery of further evidence.

At the end of questions and answers forming part of an application for life insurance was an undertaking by the applicant as follows: I do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association (the defendants); and I further agree that any misstatements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon."

The answers of the insured to the questions of the medical examiner were not in writing, and no evidence was given at the trial to show

what the answers were, but the insured certified in effect that he had truly answered whatever questions the examiner put to him, and the examiner made a written report of his examination of the insured.

Held, that there was no absolute warranty by the insured of what was contained in the medical examiner's report, nor of the truth of the written answers of the insured to the questions forming part of the application. The words, "to the best of my knowledge and belief," in the application, govern the words "any misstatements or suppression of facts" in the latter part thereof.

The defendants further contended that, even assuming there was no absolute warranty, the insured had been guilty of wilful and untruthful representations or suppressions, viz., as to three of his brothers having suffered from illness showing symptoms of pulmonary disease; the insured having himself met with an accident which he had not disclosed, and having been attended by two doctors whose names he had not given, and that these would be sufficient to avoid the policy. The judge at the trial charged as follows: "If you think there is anything in these answers which was calculated to mislead the defendants and induce them to enter into the contract when they otherwise would not have done it, then your verdict should be for the defendants. But if, on the other hand, you think the answers reasonably fair and truthful, to the best of the knowledge and belief of the man, I think your verdict should be for the plaintiffs." The jury found for the plaintiffs.

Held, that the verdict should not be disturbed.

The defendants after the trial discovered some fresh evidence, viz.. some declarations and a letter of the insured showing his state of health before and after the signing of the application for insurance, as to which evidence had been given at the trial.

Held, HAGARTY, C.J.O., *dubitante*, that the nature of the evidence would not warrant the granting of a new trial merely to enable the defendants to tender it. And the refusal, by reason of a disagreement of the Divisional Court, of a motion made by the defendants for a new trial on the ground of the discovery of fresh evidence (11 O. R. 120) was therefore affirmed.

JOHNSTON v. MOODY.

Attachment of debts—Issue—Rule 375.

The plaintiff after recovering judgment against the defendant upon a money demand, issued an attaching order upon moneys in the hands of the C. Company, which were admittedly not the moneys of the latter, and which the plaintiff swore he was informed and believed belonged to the judgment debtor, but which were claimed by a son of the latter. There was nothing before the judge of the County Court (Middlesex) to support the assertion of the plaintiff, and the examination of the claimant, taken at the instance of the plaintiff, showed that there was no reason to suppose that the claim of the former was not well founded.

Held, that the judge had, under Rule 375, a discretion to direct or refuse to direct the trial of an issue, and that such discretion was properly exercised in refusing to so direct, and in rescinding the attaching order.

Semble, if the plaintiff had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor, or to cast a suspicion upon the *bona fides* of the claim of the son, it would have been the duty of the judge to direct an issue, if the plaintiff desired it.

INTERNATIONAL WRECKING CO. v. LOBB.

Practice—Appellant proceeding on judgment appealed from—Abandonment of appeal.

By the judgment of the Common Pleas Division, 11 O. R. 408, delivered on the 6th March, 1886, it was adjudged that the plaintiffs' services alleged in the statement of claim were salvage services, and that they were entitled to be remunerated therefor as such; and that the vessel in question should be sold, one-half of the purchase money paid to the plaintiffs, their costs out of the other half, and the residue to the defendant.

On the 5th April, 1886, the plaintiffs gave notice of appeal, their contention being that they were entitled to be paid the full value of their services, which was fixed by agreement at $4,000.

On the 20th April, 1886, the defendant's solicitor wrote to the plaintiff's solicitors: "The judgment entitles you to a sale of the

vessel and one-half of the proceeds, and your costs out of the other half. The water is going out of the canal, and it is likely that unless something is done the vessel will be further injured. As your clients have a larger interest in it than ours, we think you should interest yourselves in preventing any injury to the schooner.

"We shall proceed to have the judgment issued at once in order that the vessel may be offered for sale as soon as possible, as otherwise she will have to be as she is, all season, and will be still further deteriorated." The defendant's solicitor swore that when he wrote this letter he thought that the plaintiffs were not sincerely intending to prosecute their appeal, nothing further having been done in the appeal, and the notice not having been served until the time for doing so had almost expired.

On the 14th June, 1886, the plaintiffs entered judgment, and afterwards took it into the Master's office where an advertisement was settled, and the vessel was sold for $700, which was paid into court. At the same time the plaintiffs carried on their appeal proceedings, and on the 27th August, 1886, the defendants served notice of motion to quash the appeal.

Held, that a party may appeal from a judgment in his favour if he thinks it should have been a judgment of a different character, but he must be taken to have abandoned his appeal, if he proceeds under the judgment. By the appeal the plaintiffs sought to obtain a judgment *in personam*, while the judgment appealed against, gave them a remedy *in rem;* having taken this remedy they could not be heard to say that it was not the one to which they were entitled.

If it had appeared that the letter of the 20th April, 1886, was written for the purpose of leading the opposite party into a false position, or to induce him inadvertently to take a course destructive of his appeal, the plaintiffs might have been relieved from the consequence of their acts, but it did not so appear, and it could not be said that the sale was one made by consent. The appeal was therefore quashed.

BANK OF MINNESOTA v. PAGE.

Practice—Appeal from District Court—Order for judgment under Rule 80—Order for security for costs, effect of non-compliance with.

There is a right of appeal to the Court of Appeal from the judgments of the District Courts of the Provisional Judicial Districts, R. S. O. c. 90, s. 34, imports that when by the law in force with regard to County Courts an appeal lies from those courts to the Court of Appeal, it lies also from the District Courts. An order for leave to sign judgment under Rule 80 is in its nature final and not merely interlocutory, and therefore such an order, if made in a County Court, would be appealable by virtue of 45 Vict. c. 6, s, 4, and is also appealable when made in a District Court.

47 Vict. c. 14, s. 4, assumes the existence of the right of appeal from District Courts; and the optional right to move against the verdict in the High Court, provided by sub-sec. 5, is not the appeal referred to in the first part of the section, in the words "subject to appeal."

On the 5th November, 1885, an order was made requiring the plaintiff to give security for costs within four weeks, and in default, that the action should be dismissed with costs, unless the court or judge, on special application for that purpose, should otherwise order. Within the four weeks the plaintiff took out a summons, with a stay of proceedings, for "further time to perfect security for costs," and on the 10th December, 1885, an order was made extending the time till the 23rd December, 1885, but not providing that the dismissal of the action should be the result of non-compliance with its terms. Security was not furnished within the time so extended, and it was contended that after that the action was dead, and there was no jurisdiction to make an order in it.

Held, that the action never became dismissed under either of those orders, and that a motion to dismiss was regular and necessary.

Leave to sign judgment under Rule 80 should not be granted, save where the case is clear and free from doubt; and under the circumstances of this case an order for such leave made by the judge of the District Court of Thunder Bay was reversed.

EASTMAN v. THE BANK OF MONTREAL

An appeal from the judgment of BOYD, C., 10 O. R. 79, was dismissed by reason of the members of the court being equally divided in opinion.

Per HAGARTY, C.J.O., and OSLER, J.A.—The judgment below should be affirmed.

Per BURTON and PATTERSON, JJ.A.—The appeal of the plaintiff against the Bank of Montreal, so far as it relates to the character of the debts upon the discounted notes, should be allowed.

MOXLEY v. CANADA ATLANTIC RY. CO.

Railway company—Fire caused by engine—Negligence—Evidence—New trial.

In an action for damages for negligence the complaint was that owing to negligent construction, or management, sparks of ignited matter had escaped from an engine of the defendants', and caused a fire which had spread and destroyed fences, and trees, on the farms of the two plaintiffs.

The evidence did not directly show the cause of the fire, but it showed that an engine, No. 4, had passed the place of the fire about an hour and a half before it, or the smoke from it, was perceived, and that another engine, No. 406, had passed about an hour and a quarter later, or about a quarter of an hour before the smoke was perceived. Engine No. 4 was said to be out of order, and was a wood burner, but it was not shown that there was any defect in No. 406, which was a coal burner, and it was assumed at the trial that it was properly constructed and in good condition. Evidence was given, in the shape of depositions taken before the trial, of two employés of the defendants, to the effect that an engine properly constructed and in good order could not throw dangerous sparks which would not be dead before they reached the ground, and one of them said that a greater quantity of fire would escape from a wood than from a coal burner. Two witnesses who were near at the time of the passing of the engines said that they saw no smoke or fire till after both trains had passed.

It was contended that the probabilities were very much against the fire having been caused by No. 4, the engine which was in bad order, and that, as the case depended altogether upon inferences from circumstantial evidence, there was not a case for the jury. The case was, however, submitted to the jury, and verdicts were found for the two plaintiffs.

Held (BURTON, J. A., dissenting,) affirming the judgments of the Queen's Bench and Common Pleas Divisions refusing orders *nisi*, that there was evidence from which the jury might infer that engine No. 4 was the cause of the fire; it was a presumption of fact depending on the circumstances of the case, and it was for the jury to fix the weight which should be given to it.

Per BURTON, J.A.—It was incumbent upon the plaintiffs to furnish evidence, not only of negligence but of its connection with the loss; and this was not done by showing that the fire broke out an hour or two after engine No. 4 passed, another engine which might have caused it having passed in the meantime; and the judge ought to have withdrawn the case from the jury upon the ground that there was no evidence of the issue which the plaintiffs were bound to establish, fit for them to take into consideration. The part of the evidence of the two employés above noted should have been rejected upon the ground that it came within the saving of "just exceptions," and also because judges as well as juries know what is the usual and normal state of things, and that it is a matter of common and universal knowledge that no locomotive worked by steam ever has been, or ever can be, constructed which can be effectively operated without throwing fire, or capable of causing such a loss as the present.

SHIELDS v. MACDONALD.

Practice—O. J. A., s. 48—Compulsory reference to referee—Jurisdiction of judge.

A judge has jurisdiction under O. J. A., sec. 48 to make a compulsory order referring not only questions of account but all the issues of fact in an action to an official referee.

Ward v. *Pilley*, 5 Q. B. D. 427, followed.

The plaintiff's claim was upon a verbal agreement entitling him to one-half of a certain commission received by the defendant, and his case depended upon his being able to prove the agreement, and to show that he per-

formed the services which were to form the consideration for it; if the plaintiff succeeded in establishing the agreement, and performance, the taking of an account would necessarily follow.

The defendant had also filed a counterclaim, as to which there was no question that it would be proper to direct a reference, either to arbitration or to an official referee. Two days after the commencement of the action the defendant's solicitor wrote, suggesting that all accounts between the parties should be settled by arbitration. The plaintiff subsequently made a motion to refer to an official referee under sec. 48, and the defendant also served a notice of motion to refer to a named arbitrator, or to some other arbitrator to be named by the court. The affidavit filed in support of the defendant's motion stated the belief of the defendant that the whole matter could be settled by a reference back to the court, by reference to an arbitrator who would have authority to decide as to the validity of the alleged agreement.

Held, that the real contest between the parties was as to the individual to whom the reference should be made; for the difference between a compulsory reference of the whole action to arbitration, and a reference of all the issues of fact in the action to a referee, was in this case not important; and the discretion exercised by WILSON, C.J., in referring the action to a referee, without the consent of the defendant, should not be interfered with.

MCKENNA v. MCNAMEE.

Contract—Destruction of subject matter of contract by vis major.

Where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by the act of God or *vis major* over which neither party has any control and without either party's default, the parties are relieved.

The defendants, who had had a contract with the government of B. C. for the performance of a public work, but had forfeited it after a part of the work had been done, agreed with the plaintiffs that the latter should do the remainder of the work under the contract, and should receive ninety per cent. of the amount of every estimate issued till the completion of the work. The written instrument embodying the agreement referred to the contract as an existing one, but the fact was, as was fully known by all the parties, that at the time of making the agreement the contract had been forfeited, and the government had taken possession of the works. No advantage was taken by the defendants; the plaintiffs had examined the contract with the government, and understood as well as the defendants the exact position of affairs, but all trusted in the possession of certain influence by which they hoped to get back the contract and resume work upon it.

Held, affirming the judgment of the Queen's Bench Division (not reported), that the failure to obtain a restoration of the contract destroyed the whole consideration for each party's agreement or undertaking.

WOODRUFF v. MCLENNAN.

Practice—Foreign judgment, action on—Evidence—Fraud.

In an action upon a foreign judgment the defence was that the plaintiff fraudulently misled the foreign court by swearing to what was untrue to his knowledge at the trial of the original action. The matter in dispute was a claim for extra services in hauling logs for a greater distance than required by a contract between the plaintiff and defendants, and the contest was upon the question whether the services were, or were not, within the terms of the contract. On this question the evidence of the plaintiff and of one of the defendants, and of other witnesses, was given at the trial in the foreign court, the contract and certain letters were put in, and the judge's charge to the jury shewed that the whole evidence was clearly brought to the attention of the court. The verdict in the foreign court was in favour of the plaintiff, but it was now sought to establish the falsehood of the plaintiff's evidence with respect to the extra services.

Held, affirming the judgment of the Common Pleas Division (BURTON, J.A., dissenting,) that evidence under the defence was properly rejected at the trial, for what the defendants proposed to do was to try over again the very question which was in issue in the original

action. The charge of fraud was super-added, but that charge involved the assertion that a falsehood was knowingly stated, and before the question of *scienter* was reached a conclusion of fact adverse to that which had been arrived at by the jury would have to be adopted.

Per BURTON, J.A.—In admitting evidence under the defence, the court would not be assuming to re-try the issues disposed of in the foreign court, the finding upon those issues, being conclusive, cannot be questioned here; but it can be shewn that the decision arrived at was obtained by fraud practised upon the foreign court, and that right cannot be defeated because, in order to establish it, it becomes necessary to go into the same evidence as was used on the former trial to sustain, or defeat, that issue. The issues are not the same, although if the facts now discovered could have been shown at the former trial they would have secured a different result.

The authority of decisions of the English Court of Appeal, and the case of *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295, discussed.

MATTHEWS v. THE HAMILTON POWDER CO.

Master and servant—Injury caused by fellow servant—Negligence.

Action for damages by the administratrix of M. who was killed by an explosion of the defendants' powder mills, caused by a shaker being out of repair. W., a director of defendants, had some time before the explosion, when the works were idle, given express directions to C., the superintendent and head of the works, to have the shaker repaired before commencing operations, but C. neglected to attend to it, and the repairs were not made. It was not shown that W. in any way assumed to direct the practical workings of the mills, or that he had any special knowledge or ability to do so, and there was no suggestion that C. was an incompetent or improper person to employ.

Held, reversing the judgment of the Q. B. Division, 12 O. R. 58, that the intervention of W. had not taken the case out of the general rule of law, that the defendants were not responsible for accidents due to the negligence of a fellow servant, which C. was.

CHAPUT v. ROBERT.

Qui tam action—Non-registration of partnership—Parties—Joinder of parties—Practice.

An action by several plaintiffs, *qui tam* against two defendants for penalties for not registering their partnership under R. S. O. c. 123, of which s. 11 gives the action to any person who may sue.

Held, reversing the judgment of the court below, (1) That under the above section and the Interpretation Act an objection to the action being brought in the name of more than one person should not prevail; (2) That the circumstance that the plaintiffs lived out of the jurisdiction could not defeat their action; (3) That an objection that the claims against the two defendants were improperly joined in one action was not a ground of demurrer; and

Per OSLER, J.A.—There was no inconvenience or impropriety in joining these two defendants in one action.

BELL v. MACKLIN.

Vendor and purchaser—Misrepresentation—Compensation—Appeal on question of fact.

After conveyance of land by the defendant to the plaintiff, the latter complained that he had been induced to purchase by a misrepresentation of the quantity of land, and by his statement of claim asked to have the conveyance rescinded, or for an abatement of the purchase money. The contract for sale was in writing and contained no provision for abatement or compensation, and the deed conveyed the precise land which the defendant swore he had agreed to sell.

At the trial PROUDFOOT, J., pronounced a decree for compensation to the plaintiff for deficiency in the land sold, and the Divisional Court affirmed it.

Held, that as a matter of law the award of compensation was, under the circumstances, erroneous; and that upon the evidence the finding of fact by the trial judge could not be supported, and therefore rescission could not be decreed, HAGARTY, C.J., dissenting.

The circumstances under which an Appellate Court will reverse the decision of the tria udge upon a question of fact discussed.

QUEEN'S BENCH DIVISION.

Divisional Court.]

REGINA v. DUNNING.

Weights and Measures Act—42 Vict. ch. 16 (D.), and amendment—Crime—Evidence of defendant — Imprisonment — Jurisdiction — Certiorari— Conviction bad in part.

The defendant was convicted by two justices of the peace under the Weights and Measures Act, 42 Vict. ch. 16, sec. 14, sub-sec. 2 (D.), as amended by 47 Vict. ch. 36, sec. 7 (D.), of obstructing an inspector in the discharge of his duty, and was fined $100 and costs, to be levied by distress, imprisonment for three months being awarded in default of distress.

At the hearing before the justices the defendant tendered his own evidence, which was excluded.

The defendant appealed to the Quarter Sessions, and on the appeal again tendered his own evidence, which was again excluded, and the conviction affirmed.

On motion for *certiorari*,

Held, that, the conviction having been affirmed in appeal, *certiorari* was taken away, except for want, or excess, of jurisdiction, and that there was no such want, or excess, of jurisdiction, inasmuch as the justices and the Quarter Sessions had jurisdiction to determine whether the defendant's evidence was admissible or not, and that such determination, even if erroneous in law, could not be reviewed by *certiorari*.

Per ARMOUR, J.—That even if the determination on this point could be reviewed, the justices were right in excluding the evidence of the defendant, inasmuch as the offence charged was a crime.

Held, also, (ARMOUR, J., dissenting,) that although irregularly directed, imprisonment was justified in default of distress by sec. 62 of 32 and 33 Vict. ch. 31 (D.), incorporated in the Weights and Measures Act by sec. 53 thereof; but that if such imprisonment were not so justified the whole conviction would be bad, there being no power to amend by striking out the award of imprisonment.

Per ARMOUR, J.—That the 32 & 33 Vict. ch. 31, sec. 62 (D.), should only be construed as fixing the duration of the term of imprisonment, where the special Act provides specifically for some imprisonment without fixing its duration; and that as no imprisonment is expressly imposed by the Weights and Measures Act for the offence charged here, so much of the conviction as awarded imprisonment was made without jurisdiction, and was therefore bad; but that it was separable from the rest of the conviction, and should be quashed, leaving, however, the rest of the conviction to stand.

Shepley and *McDougall*, for motion.

Clement, contra.

Divisional Court.]

HENDERSON v. KILLEY ET AL.

Partnership—Dissolution—Agreement by new firm to pay debts of old—Right of creditors to enforce —Creation of trust.

K. and M., having carried on business under the name of K. & Co., dissolved partnership, and K. gave M. sixteen promissory notes for $500 each, with interest, for his share in the business, which was continued by K. K. afterwards, by agreement under seal, formed a partnership with O., to continue until a joint stock company should be formed to take over their assets, and K., by this deed, was to transfer to the co-partnership, as his contribution to the capital, all the assets of his business, to be taken at a valuation, subject to the deduction of his liabilities, which were to be assumed by the co-partnership and charged against him. Amongst K.'s liabilities, known to O., were ten of these notes, which he had indorsed to the plaintiff before they fell due. The new firm paid two of them, with interest on others, and there were negotiations for an extension of time to pay the whole. The company had been formed, and K. had transferred his interest to it. The assets of K. transferred to the new firm were sufficient to pay his liabilities.

Held, that though the plaintiff could not have sued upon the deed, not being a party to it, the circumstances established the relationship of trustee and *cestui que trust*, and entitled the plaintiff through K., as her trustee, to enforce performance of the stipulation in the deed for payment of the notes held by her.

Osler, Q.C., for motion.

Robinson, Q.C., and *Mackelcan*, Q.C., contra.

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DIARY FOR SEPTEMBER.

17. Sat.....First Parliament of Upper Canada met at Niagara, 1792. Trinity term ends.
18. Sun .....*15th Sunday after Trinity.* Quebec surrendered to the British, 1759.
21. Wed ...Sir Walter Scott died, 1832.
25. Sun.....*16th Sunday after Trinity.*
28. Wed.....W. H. Blake first Chancellor U. C., 1849.

TORONTO, SEPTEMBER 15, 1887.

THE following alterations have been made in the date of the Chancery Sittings at the following places:—Kingston will be held on 9th November instead of 12th September; Peterborough will be held on 27th October instead of 27th September; Barrie will be held on 1st November instead of 10th October. Mr. Justice Ferguson will take the Woodstock Sittings instead of Mr. Justice Robertson.

Mr. Justice Robertson, in addition to his Chancery Sittings, will hold the Assizes at Owen Sound on 26th September, Ottawa on 3rd October, Pembroke 17th October.

A LEARNED Q.C. in the city of Winnipeg has, we are informed, put up at the doorway of his office a huge black signboard, four feet long and three feet wide, on which are printed in large gold letters:

X. Y. Z———,
Q.C.,
Barrister, etc.,

the letters Q.C. being three times the size of the others.

This method of advertising has, at all events, the merit of novelty, and we are informed it excites great curiosity among the uninitiated as to the meaning of the letters Q.C. Some think they cannot mean "Queen's Counsel," otherwise "Barrister," etc., would not have been added, because no man can be a Queen's Counsel unless he is a barrister, and to add barrister after Q.C. is like adding the words "biped, masculine gender." While the learned gentleman may be congratulated on the fertility of his ideas, and his ability to create a mystery out of a very simple matter, yet we think it is to be regretted that these qualities should be exercised in a way that is calculated to make his professional brethern conclude that he has forgotten the maxim *noblesse oblige*.

A POINT of some novelty and importance was recently considered by the Chancellor in Chambers, *in re Hall*. The facts of the case were as follows:—An intestate had left among his assets a promissory note for $500 made by his son; the son had predeceased the intestate and his estate was insolvent; he however left issue, and the question submitted to the Chancellor was whether the $500 due on the promissory should be brought into hotch-pot as an advancement made to the son, or whether it could be set off against the distributive shares which the children of the maker were entitled to of the intestate's estate. The point was raised by the administrator as against the grandchildren on an application to which the other next of kin were not parties, and consequently the learned Chancellor was unable to dispose of the whole case. He however determined that as between the parties before him the $500 could not be required to be brought into hotch-pot in fixing the shares of the grandchildren; nor could the debt due by their parent be set off against their distributive shares of the estate. He therefore directed the ad

ministrator to pay the whole share of the grandchildren into court, leaving the other next of kin to make application in respect to it as they might be advised.

In *Filman* v. *Filman*, 15 Gr. 648, Spragge, V.-C., pointed out the difference in our own and the English law respecting the advancement of children; this provision in our statutes, though appearing as section 41 of the Act respecting the descent of real property, nevertheless in terms applies to the descent both of real and personal estate, and requires any advancement to be so expressed by the intestate in writing, or to be so acknowledged in writing by the child to whom it is made. In the absence of writing, either of the intestate, or the child, evidencing the advancement as an advancement, it would seem that there is no liability to bring into hotch-pot sums received by a child from his parent. A promissory note, the Chancellor held, was not such a writing as the statute contemplated; it was evidence of a debt, and created a legal liability, and, in his opinion, it could not also be treated as an acknowledgment by the son of an advancement. This point, however, owing to the absence of the other next of kin, can not be said to be conclusively settled by *Re Hall*.

RECENT DECISIONS UNDER THE MARRIED WOMEN'S PROPERTY ACT.

IT is a very singular fact that it is almost a legislative impossibility to frame a Married Women's Property Act which can stand the test of judicial construction, and at the same time successfully carry out the intention of the framers of the Act. By what the uninitiated and irreverent critic might be disposed to term a perverse ingenuity, the judges seem always able to show that these Acts have precisely the opposite effect to that intended.

It was fondly hoped that the English Act of 1882, on which our Provincial Act of 1884 is based, had succeeded in removing all the defects that the course of judicial decision had disclosed in the former Acts, but this hope we fear is altogether illusory. In *Palliser* v. *Gurney*, 22 L. J. 112, Lord Esher, M. R., and Lindley and Lopes, LL.J., sitting as a Divisional Court of the Queen's Bench Division, held, that in an action founded on contract against a married woman, the plaintiff must give evidence that the defendant was possessed of separate property at the time when the contract was made, otherwise he must be non-suited. As supplementary to this case we may also refer to the decision of *Becket* v. *Tasker*, 19 Q. B. D. 7, where it was held, that property acquired by a married woman after her coverture has ceased, is not liable for the payment of debts contracted by her while under coverture.

It has always been a recognized principle of the Married Women's Property Acts that the property, and not the person, of the married woman should be rendered liable for her debts; and it is owing to the endeavour to maintain this principle, that the Act of 1882 has been found wanting. That Act provides "a married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property, on any contract," etc. And the court in *Palliser* v. *Gurney* appears to have reasoned, that as she is only capable of making herself liable to the extent of her separate property, it must be affirmatively proved that at the time she entered into the contract sued, on she had some separate property, otherwise there was nothing for the contract to operate upon. It is not, of course, necessary to prove that the separate property she then had

was sufficient to answer the demand, it is enough, apparently, to prove that she had some separate property, no matter how insignificant it may have been in amount. The result of the case is, that if it can be shown that at the time a married woman enters into a contract she had a dollar of separate property, the contract may be enforced against her to the extent of any separate property she may subsequently acquire during her coverture; but if it cannot be proved that she had the dollar, then the contract is invalid and cannot be enforced, though she may subsequently during her coverture have acquired ample separate property to answer the demand. No one can reasonably suppose that the Legislature intended any such absurd result. Then the Act provides that "every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Here again the process of judicial construction has materially limited the operation of the Act. Seizing on the words "separate property," the court has held that that species of property can only be acquired during coverture, and therefore if a married woman having made a contract subsequently becomes a widow, and during her widowhood acquires property, that property is not "separate" property, and is therefore not liable to answer a debt contracted by her during coverture. Here again we cannot help thinking the intention of the Legislature has been frustrated. Any such limitation as the court has discovered in the language used, could hardly have been contemplated by the framers of the Act. This section was no doubt framed to meet the case of *Pike* v. *Fitzgibbon*, 17 Chy. D. 454, which determined that a married woman, in the then state of the law, could not by her engagements bind anything but her separate estate, to which she was entitled without restraint on anticipation at the time when the engagement was entered into. And that any engagement entered into by her was a nullity as respects any separate estate she might afterwards acquire, or which when she entered into the engagement she held subject to a restraint on anticipation, although the restraint on anticipation were subsequently removed by the death of her husband.

It is clear, therefore, that if *Beckett* v. *Tasker* and *Palliser* v. *Gurney* are rightly decided, that the attempt to get rid of the effect of *Pike* v. *Fitzgibbon* has been only successful to a very limited degree. It is still necessary to establish affirmatively the possession of separate property by a married woman at the date of any contract she may make, and although it is not now necessary to go on and prove that she is still, at the time of the trial, possessed of that same property, it would seem to be still necessary to go on and prove that at the date of the trial she has some separate property. Furthermore, though separate property acquired by a married woman subsequently to her contract is made liable to the creditor, yet property acquired by her after the coverture has ceased is, as we have seen, declared to be exempt from liability for her contracts made during her coverture.

There is yet another recent case to which attention may be directed, which, though of no direct importance in this Province, is nevertheless illustrative of the disposition of the courts to restrict the operation of the Acts attempting to emancipate the property of married women from marital control.

The case we refer to is *Re Smith, Clements* v. *Ward*, 35 Chy. D. 589, 56 L. T. N. S. 850. There a testatrix who was married before the Married Women's

Property Act, 1882, died in 1886 leaving her husband surviving, and by her will in 1885 she bequeathed £300 of her separate property for the erection of a church. But the Act 43 Geo. III., c. 108, which empowers persons to make bequests for the erection of churches, contained a proviso excluding women covert without their husbands; and it was held by Stirling, J., that the proviso was not affected by the Married Women's Property Act of 1882, and that the gift was therefore void under the statutes of mortmain for want of the husband's concurrence, and this, notwithstanding that the Act of 1882 provides that "a married woman shall in accordance with the provisions of this Act be capable of acquiring holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee."

RECENT ENGLISH DECISIONS.

The *Law Reports* for August comprise 19 Q. B. D. pp. 149-280; 12 P. D. pp. 157-166; and 35 Chy. D. pp. 399-613.

PRACTICE—REFERENCE TO REFEREE UNDER J. A., S. 56—POWER OF REFEREE TO EXAMINE WITNESSES—COMPANY BORROWING ULTRA VIRES—SUBROGATION OF LENDER TO RIGHTS OF CREDITORS.

In *Wenlock* v. *The River Dee Co.*. 19 Q. B. D. 155, two points were determined. The first was, that under a reference to a referee under the Judicature Act, 1873, s. 56, an inquiry by the examination of witnesses is contemplated, and not only an inquiry by personal observation of the referee. The second point was this, that when a company borrows money *ultra vires*, the lender is entitled to be subrogated to the rights of the creditors who are paid out of the money so borrowed, whether their debts were in existence at the time of the loan, or were subsequently contracted, and whether such debts were paid by the defendant company or their bankers out of such advances.

BILL OF EXCHANGE—BILL DRAWN ON FIRM—ACCEPTANCE IN NAME OF INDIVIDUAL—PRINCIPAL AND AGENT—AUTHORITY TO ACCEPT.

Odell v. *Cormack*, 19 Q. B. D. 223, was an action on a bill of exchange, drawn and accepted under the following circumstances: The defendant was a partner in a firm of C. Brothers, and she agreed with her co-partner to a dissolution of the partnership, and that the affairs of the firm should be liquidated by an agent, who was to realize the assets and pay the creditors, and the business was thereafter to be carried on by the defendant. The defendant and the agent opened a joint banking account, and requested the bank to honour drafts signed by either of them. Cheques were drawn on the joint account signed by the agent in the names of the defendant and himself, and bills were drawn on C. Brothers and accepted by the agent in the names of the defendant and himself and honoured, but the defendant knew nothing of these cheques and bills. The action was brought by the plaintiff as indorsee for value of a bill of exchange, drawn on C. Brothers, accepted by the agent in the names of himself and the defendant, and made payable at the bank where the joint account was opened. It was held by Hawkins, J., that the agent had no authority to accept the bill in the defendant's name so as to bind her, and that not being a partner in the firm of C. Brothers, he had no authority to accept bills drawn on the firm, and the defendant was not liable. The judgment turns simply on the fact of the want of authority of the agent to bind the defendant.

If Mrs. Cormack had authorized Carter (the agent) to accept bills drawn on the firm in her own name, the learned judge says he should have held the acceptance in question sufficient to bind her, and that the addition of the agent's own name would have been immaterial and might have been rejected as surplusage.

PARTNERSHIP—SALE OF GOODS—BILL GIVEN FOR PRICE—UNSATISFIED JUDGMENT ON BILL—ACTION AGAINST JOINT CONTRACTOR—RES JUDICATA.

In *Cambefort* v. *Chapman*, 19 Q. B. D. 229, the principle laid down in *Kendall* v. *Hamilton*, 4 App. Cas. 504, was applied. The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved, and the plaintiffs, in ignorance of the dissolution, drew bills for the price

of the goods, which were accepted after the dissolution by W. in the partnership name. The plaintiffs sued W. in the partnership name on the bills, and recovered judgment, which was not satisfied. The plaintiffs then brought the present action against the defendant for the price of the goods; but it was held by Field and Manisty, JJ. (affirming Mathew, J.), that the judgment against one joint contractor on the bill given by him alone for the joint debt, though unsatisfied, was a bar to an action against the other joint contractor on the original contract.

PERSONAL REPRESENTATIVE—CONTRACT MADE WHILST NO PERSONAL REPRESENTATIVE TO DECEASED PERSON'S ESTATE—RATIFICATION.

In re Watson, 19 Q. B. D. 234, the Court of Appeal affirmed the judgment of the Queen's Bench Division, 18 Q. B. D. 116, noted *ante* p. 64. During a period in which there was no personal representative of the estate of a deceased testatrix, the appellant, acting upon the instructions of a relative of the deceased, did work as a solicitor in respect of the administration, and for the benefit of the estate. Subsequently another person obtained letters of administration *de bonis non*, and refused to pay the appellant's bill of costs, and the Court of Appeal held that the respondent was not bound as administrator to pay such costs. Lord Esher, M. R., says, at p. 236:

It was said that the work having been for the benefit of the estate, and Philips, as administrator, having received that benefit, it would be unconscientious in him not to pay for it. I decline to make new law in order to compel persons to do that which they are bound in conscience to do; and I am not satisfied that it is unconscientious in an administrator to refuse to pay out of other people's money for work done under such circumstances as exist here."

LIFE INSURANCE—NOTICE OF DEATH—CONDITION IN POLICY—OMISSION TO COMPLY WITH CONDITION.

Stoneham v. *Ocean, Railway, and General Accident Insurance Company*, 19 Q. B. D. 237, was an action brought on a policy of life insurance which was made subject to the conditions indorsed thereon, which were to be considered as incorporated therein. One of these conditions provided that "in the event of non-fatal injury by an accident occurring to the assured, notice thereof in writing shall be given to the company within seven days of the occurrence thereof;" and another condition provided "in case of fatal accident notice thereof must be given to the company at the head office in London within the like time of seven days."

The assured was accidentally drowned in Jersey and notice was not, and under the circumstances of the case could not have been, given to the company in accordance with the last mentioned proviso. The question for the court was whether this condition was a condition precedent to the right to recover on the policy. The court (Mathew and Cave, JJ.,) held that the giving of notice was not a condition precedent, and that the plaintiff was therefore entitled to recover. The court was led to this conclusion, from the fact that certain other conditions also indorsed on the policy were expressly made conditions precedent, whereas this particular condition contained no such stipulation. Cave, J., says at p. 241:

The conditions indorsed on the policy are of all sorts and vary much in their language. Some of them contain provisions that in case of non-compliance the policy shall be void; others do not. It seems to me that the rational conclusion is that all these conditions mean what they say, and that where there is a provision that the condition shall be a condition precedent it is so, but where there is no such provision it is not.

MARINE INSURANCE — DAMAGE TO CARGO BY IMPROPER NAVIGATION—NEGLIGENCE.

Carmichael v. *Liverpool Mutual Indemnity Association*, 19 Q. B. D. 242, is a decision of the Court of Appeal on a question of marine insurance law. By the articles of a mutual insurance association, the plaintiffs as members were to be indemnified against loss arising to goods or merchandise caused by "improper navigation of the ship carrying the goods."

A cargo of wheat was shipped on board a vessel belonging to the plaintiff. During the loading of the cargo a port hole in the side of the vessel was, by negligence of persons employed by the plaintiffs, insufficiently secured, so that, during the voyage, water leaked in and damaged the wheat. The leak did not hinder or impede the navigation of the ship. The question was whether this was a loss arising from "improper navigation," and the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, LL.J.,) held (affirming the judgment of the Divisional Court (A. L. Smith and Wills,

JJ.,) that it was, and that the plaintiffs were entitled to recover.

COMPANY—LIQUIDATION—MASTER AND SERVANT—APPOINTMENT OF MANAGER AND RECEIVER—DISCHARGE OF SERVANTS.

Reid v. *The Explosives Company*, 19 Q. B. D. 264, is another decision of the Court of Appeal. The plaintiff was in the employment of the defendant company under a contract which provided that his employment might be determined by a six months' notice. The company having got into difficulties, a manager and receiver was appointed by order of the Chancery Division, at the instance of the debenture holders of the company. The plaintiff, by the instructions of the manager, continued for more than six months to discharge his former duties at the same salary. The business was then sold to a new company, and the plaintiff was dismissed without notice. The action was then brought for wrongful dismissal. But the Court of Appeal (affirming Manisty, J.) held that the appointment of the manager and receiver operated as a discharge of the servants of the company, and that the plaintiff therefore could not recover.

The court while holding that on the appointment of the receiver there was a wrongful dismissal by the defendant company, for which the plaintiff would have had a right of action if nothing further had occurred, yet held that as the plaintiff had been employed by the receiver for a period of time equal to the time agreed on for notice of dismissal, he had employment of equal value to that which he had lost, and had therefore sustained no damage.

BILL OF SALE—SUFFICIENCY OF DESCRIPTION OF CHATTELS.

In *Witt* v. *Banner*, 19 Q. B. D. 276, it was held by Wills and Grantham, JJ., under the Bills of Sale Act, 45 & 46 Vict. c. 43, s. 4, which provides that every bill of sale is void, except as against the grantor, in respect of chattels not specifically described in the schedule annexed thereto, that a description of "four hundred and fifty oil paintings in gilt frames, three hundred oil paintings unframed, fifty water colours in gilt frames, twenty water colours unframed, and twenty gilt frames," was not a sufficient description.

None of the cases in the Probate Division require notice here.

COMPANY—PROMOTERS—PURCHASE OF MINE BY SYNDICATE—RESALE TO COMPANY—FIDUCIARY RELATION—SECRET PROFIT—PRINCIPAL AND AGENT—SALE OF AGENT'S PROPERTY TO PRINCIPAL.

Proceeding now to the cases in the Chancery Division, the first to be noted is *Ladywell Mining Company* v. *Brookes*, 35 Chy. D. 400, in which the Court of Appeal affirmed the decision of Stirling, J., 34 Chy. D. 398, noted *ante* p. 164. This was one of those cases in which an attempt was made to fix the defendants with liability for profit made by them on a sale of property to a company, on the ground of an alleged fiduciary relationship.

On the 1st February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5,000, with a view to selling it to a company to be thereafter formed, but at that time no steps had been taken to form the company. The purchase was completed on 17th March, 1873, and the purchase money paid out of their own moneys. On the 4th April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000.

On the 8th April the company was registered under the Companies' Act, its principal object as stated in the articles of association being the purchase of the mine. The contract of 4th April was adopted, and four of the vendors were named as directors; but the contract of the 1st February, 1873, was not disclosed to the company. The share capital, £30,000, was paid up, and out of it the vendors were paid the £18,000. In 1882 the company was wound up, and the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company suffered judgment to go against them by default in an action by the lessor to recover possession of the mine. In 1884 the company commenced this action against two surviving vendors, and the representatives of three deceased vendors, to recover the secret profits made on the sale of the mine to the company, on the ground that the vendors stood in a fiduciary relation to the company. But the Court of Appeal agreed with Stirling, J., that the evidence did not establish that the vendors, when they purchased the mine, were promoters of, or in a fiduciary position towards, the company which was ultimately formed; and that even assum-

ing that the vendors committed a breach of duty in not informing the company, at the time of the sale to the company, that the mine was their own property, and consequently that the company might have then rescinded the contract; yet, as rescission was now impossible, because the property no longer belonged to the company, the company could not recover from them the profits which they had made.

Patent — Novelty — Prior publication — Foreign specification in patent office library.

Harris v. *Rothwell*, 35 Chy. D. 416, is an important decision on a point of patent law. In December, 1878, and February, 1880, the specifications in the German language were deposited in the free public library of the English patent office, of certain inventions for which German patents had been granted; and the journal published periodically by the English patent commissioners, amongst the list of patents granted in Germany, contained entries of the particular patents, with a note in each case that the specifications as well as the list of applications might be consulted in the free public library of the office. In April, 1880, a patent was obtained in England for an invention similar to those for which the German patents had been granted, and it was held by the Court of Appeal, affirming the decision of Chitty, J., that the proper inference from the above facts was, that the public availed themselves of the facilities afforded them for obtaining information as to the inventions, and accordingly that there was sufficient evidence of prior publication to invalidate the English patent, and that this inference was not affected by the fact of the prior specifications being in the German language. Cotton and Lindley, L.L.J., however, were agreed that if, as in *Plimpton* v. *Malcolmson*, 3 Chy. D. 531, and *Plimpton* v. *Spiller*, 6 Chy. D. 412, and *Otto* v. *Steel*, 31 Chy. D. 241, it were proved that the foreign publication, although in a public library, was not in fact known to be there, the unknown existence of the publication in England would not be fatal to the patent.

Partnership — Sale of partner's interest under execution — Purchase by partner of copartner's interest — Setting aside sale — Undervalue.

Helmore v. *Smith* (1), 35 Chy. D. 436, was an action brought to set aside the sale of a partner's interest in the copartnership, to a copartner, which had been effected under an execution, under the following circumstances The plaintiff had become temporarily insane, and, during his insanity, judgments were recovered against him, and executions placed in the sheriff's hands. Under these executions the plaintiff's interest in the partnership was put up for sale, and purchased by the defendant who was his copartner, at a sum very much below its actual value, and an assignment of the plaintiff's interest was executed by the sheriff to the defendant. The purchase money was paid by the defendant by a cheque drawn by the defendant on the partnership banking account, and the amount was debited to the plaintiff in the partnership books. After the sale the defendant changed the name of the firm, and assumed to carry on the business as his own. But the Court of Appeal (affirming Bacon, V.-C.) held that the sale was void and must be set aside, and that under the circumstances there was no dissolution of the partnership by the seizure and sale. The Court of Appeal proceeded on the ground that the defendant had not bought with his own money. As Cotton, L.J. says:

> The defendant bought with part of the partnership property, subject to such rights of account as there might be between the plaintiff and defendant; and, in my opinion, that being so he cannot insist that he bought for himself, so as to prevent the plaintiff from being considered as still a partner in the business, on the ground that the purchase from the sheriff was of that which the sheriff had a right to seize.

And Lindley, L.J., neatly puts it thus:

> In point of law the necessary result of buying this share with the funds of the concern is, that there was no dissolution at all.

Practice — Attachment — Contempt of court — Interference with manager and receiver.

The next case, *Helmore* v. *Smith* (2), 35 Chy. D. 449, is one that arose out of the preceding case. After the court had made an order in the last case appointing a receiver and manager of the partnership business, a former clerk of the firm sent round a circular to the customers of the firm containing an unfair statement of the effect of the order, in that, while stating that a receiver had been appointed it omitted to state that the receiver was also manager of the business, and in this circular he solicited their custom for his own business. On a motion to commit the clerk for contempt

he declined to give an undertaking to abstain from issuing circulars calculated to draw off the customers of the firm. Though refusing to give this undertaking, he offered to undertake not to send circulars omitting to state that the receiver was also manager of the business. This Kay, J., refused to accept, and committed the offender to prison for contempt, and on appeal, the Court of Appeal sustained the decision of Kay., J.

CHARITY—MORTMAIN—CY-PRES.

Biscoe v. *Jackson*, 35 Chy. D. 460, is an illustration of the application of the doctrine of *cy-pres*. A testator directed his trustees to set apart a sum of money out of his personal estate as might by law be applied to charitable purposes, and apply it in the establishment of a soup kitchen, and cottage hospital, for the parish of Shoreditch, in such manner as not to violate the Mortmain Acts. In a suit to administer the trusts, it having been found impossible to apply the fund in accordance with the directions of the will, as no land, already in Mortmain, could be obtained within the parish of Shoreditch; under these circumstances, the fund was claimed by the next of kin; but Kay, J., held (and his decision was affirmed by the Court of Appeal) that the will shewed a general charitable intention to benefit the poor of the parish of Shoreditch, and that although the particular purpose of the bequest had failed the court would execute the trust *cy-pres*, and a scheme was directed accordingly.

CHARITY—MORTMAIN—INDEFINITE GIFT—INCLUSION OF OBJECTS WHICH ARE NOT CHARITABLE.

In re Douglas, *Obert* v. *Barrow*, 35 Chy. D. 472, a testatrix gave legacies to several charities and societies, among others to the "Society for the Protection of Animals Liable to Vivisection," and the "Home for Lost Dogs"; and she directed the trustees to apply the residue of that portion of her personal estate which might by law be appropriated by will for such purpose, among such charities, societies and institutions (including or excluding the above-mentioned societies as might be preferred), and in such shares and proportions as Lord Shaftesbury should by writing nominate. It was contended on behalf of the next of kin, that this bequest was void for uncertainty, and because it permitted the application of the fund towards the support of the two societies above-mentioned, which they claimed were not charitable. But the Court of Appeal (affirming Kay, J.), without determining whether the two societies were charities, upheld the gift, on the ground that the scope of the will shewed that the testatrix referred only to charitable societies and institutions.

PRACTICE—PLEADING—EMBARRASSING AND INCONSISTENT DEFENCES.

In re Morgan, *Owen* v. *Morgan*, 35 Chy. D. 492, is an action brought by the representatives of a wife against the executor of the husband in respect of sums of money and stock alleged to have been received by the husband as trustee for the separate use of his wife. The defendants pleaded (1) that the sums had not been received; (2) if received, not as trustee; (3) if received, repayment; (4) alternatively, free gift by wife to husband; (5) alternatively, accord and satisfaction; (6) alternatively set-off; (7) the Statute of Limitations; (8) laches and delay. The plairtiff applied to North, J., to strike out the defences 3, 4, 5 and 6. The learned judge declared that the statement of defence was embarrassing and gave the defendant leave to amend, but on appeal, the Court of Appeal (Lindley and Bowen, LL.J.,) discharged the order of North, J., and directed the defendant either to amend, or to give particulars as to the defences objected to, within fourteen days after discovery of documents.

COMPANY—WINDING UP—DIRECTORS, LIABILITY OF—PAYMENT OF DIVIDENDS OUT OF CAPITAL—DIRECTORS REMUNERATION.

In re Oxford Benefit Building Society, 35 Chy. D. 502, was an application by a creditor to compel directors of a limited company in process of being wound up, to make good sums alleged to have been misapplied by them. By the articles of association of the company it was provided that no dividends should be paid except out of "realized profits," and that no remuneration should be paid to the directors, until a dividend of 7 per cent. had been paid to the shareholders. The business of the company consisted principally of lending money to builders on mortgages payable by instalments; and the directors treated as par of the profits available for dividends the valu for the time being (upon an estimate made b a surveyor, who was also their secretary) c

the instalments of principal and interest remaining unpaid by each mortgagor. Upon this footing the directors paid for several years out of the floating capital from time to time in their hands, (1) dividends of 7½ per cent. and upwards; (2) remuneration to themselves. But it was held by Kay, J., that "realized profits" must be taken to mean profits tangible for the purpose of division, and that the directors having treated estimated profits as realized profits, and having in fact paid dividends out of capital on the chance that sufficient profits might be made, which was not the case, were jointly and severally liable, as upon a breach of trust, to repay, and must repay, the sums improperly paid as dividends, and also the remuneration they had respectively received, with interest in each case, at 4 per cent.

The directors having also, without the knowledge of the shareholders, voted and paid themselves out of the funds of the company a commission on certain purchases and sales, and entered such payment in the books of the company, but made no mention of it in their reports or balauce sheet, they were held jointly and severally liable to repay this amount, with interest at 5 per cent.

LEASE — LESSOR AND LESSEE — TRUSTEE — POWER OF LEASING — COVENANT FOR RENEWAL — BEST RENT — SPECIFIC PERFORMANCE.

The case of *Gas Light and Coke Co.* v. *Towse*, 35 Chy. D. 519, was an action for specific performance of a covenant for renewal of a lease. The lease containing the covenant had been executed by trustees under a private Act of 1828, whereby the trustees were empowered to grant building leases in possession not exceeding seventy-five years at "the best yearly rent." The lease was sanctioned by the court in the presence of the beneficiaries, and was for thirty years at a yearly rent of £30, the lessors covenanting to renew at the end of the term for a similar term, at the like rent. At the expiration of the term, the value of the property had very largely increased, so that the original rent was not now "the best rent" and the lessors therefore declined to renew. It was held by Kay, J., that the covenant was not *ultra vires*, and if the original rent had now been "the best rent" it might have been enforced; but that specific performance of it could not now be enforced, as the original rent was not now the best rent; and that the lessees could not recover damages for a breach of covenant arising from infirmity of title. On the last point the learned Judge rests his decision on the cases of *Flureau* v. *Thornhill*, 2 W. Bl. 1078, and *Bain* v. *Fothergill*, L. R. 7 H. L. 158.

MORTGAGEE—SALE UNDER POWER—SURPLUS PROCEEDS—AMOUNT UNDERSTATED BY MORTGAGEE—INTEREST—COSTS.

Charles v. *Jones*, 35 Chy. D. 544, was an action against a mortgagee who had sold under a power of sale, for an account; the defendant admitted that a sum was due from him, which he paid into court. On the taking of the accounts a much larger sum was found due,—and it was held by Kay, J., that he was bound to pay interest on the sum found due, and was not entitled to his costs of taking the accounts.

WILL—CONSTRUCTION—ILLEGITIMATE CHILD DESCRIBED AS "NEPHEW" OF TESTATOR.

In re Hall, Branston v. *Weightman*, 35 Chy. D. 551, is a decision of Kay, J., upon the construction of a will wherein the testator described R. W., who was illegitimate, and another person who was legitimate, as "my two nephews." He gave his residuary estate upon trust for the children of his brothers, E. H. and T. H., and of his sister, J. W., and his late sister, J. B., in equal shares with a gift over if any one or more of his "nephews and nieces" should die before him leaving children. R. W. was the illegitimate child of J. W., who had four legitimate children. It was held that the fact that the testator had described R. W. as "nephew" was not sufficient to entitle him to share under the gift to the children of J. W.

WILL—CONSTRUCTION—"CHILDREN" HELD TO MEAN GRANDCHILDREN.

In re Smith, Lord v. *Hayward*, 35 Chy. D. 558, is another decision of Kay, J., upon the construction of a will. In this case the testator gave his residuary estate to trustees in trust for sale and to divide the proceeds in six shares, and to pay one of such shares to the "children" of his deceased sister, and he gave the other five shares in similar terms to the children of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, and these facts were well known to the testator. Both the grandchildren survived the testator and it was held by Kay, J., that

they took the one-sixth given to the "children" of the deceased sister.

VENDOR AND PURCHASER—TITLE—SALE BY EXECUTOR MANY YEARS AFTER DEATH OF TESTATOR.

In re Whistler, 35 Chy. D. 561, was an application under the Vendors and Purchasers Act. A testator bequeathed leaseholds to his executrix upon trust to pay an annuity and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shown that there were any debts of the testator remaining unpaid, nor did it appear that the executrix had been in possession of the leaseholds as legatee. The purchaser claimed that the annuitant should be required to concur in the sale to which the vendor objected; and it was held by Kay, J., that the rule *In re Tanqueray-Willaume and Landau*, 20 Chy. D. 465, that where the executor is selling real estate after twenty years from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put on nquiry,—does not in general apply to the case of an executor selling leaseholds, and therefore the concurrence of the annuitant could not be insisted on.

SOLICITOR AND CLIENT—TAXATION AFTER TWELVE MONTHS · SPECIAL CIRCUMSTANCES.

The only point necessary to be noticed *In re Pybus*, 35 Chy. D. 568, is the fact, that where a mortgagor's solicitor charged his client with a fee for negotiating the loan, in addition to the procuration fee paid to the mortgagee's solicitor, it was held by Chitty, J., that this was an overcharge amounting to fraud, so as to entitle client to an order for taxation after the expiration of a year from the delivery of the bill, especially when the solicitor making the overcharge had neglected to comply with his clients' instructions to get the bill taxed.

PRACTICE—COMPANY—WINDING UP PETITION—WITHDRAWAL BY PETITIONER—COSTS.

In re District Bank of London, 35 Chy. D. 576, is a decision of North, J., on a question of costs. With the object of putting a stop to dilatory proceedings by a joint stock company, and to protect the assets, a shareholder presented a winding-up petition; subsequently the shareholders consented to wind up voluntarily, and the petitioner then applied to dismiss his petition, and the question was whether he should be ordered to pay the costs. North, J., though conceding the general rule to be, that when a petitioner withdraws his petition he should be ordered to pay the costs of the parties appearing, yet considered the rule not to be inflexible, and having regard to the circumstances of the present case, he refused to order the petitioner to pay costs.

MORTGAGOR AND MORTGAGEE—STATUTE OF LIMITATIONS—CESTUI QUE TRUST OF MORTGAGE DEBT, BECOMING OWNER OF EQUITY OF REDEMPTION.

The only case remaining to be noted is *Topham* v. *Booth*, 35 Chy. D. 607, in which the facts were somewhat peculiar. Mary Sharp was under a will entitled for her life to the interest on a sum of money secured by a mortgage of land. She subsequently became equitably entitled to a life estate in the equity of redemption in the mortgaged land, which was conveyed to trustees on trust for her for life. During her life she received and retained the rents for more than twenty years. On her death it was claimed by the owners of the equity of redemption, that the rights of the trustees of the mortgage were barred by the Statute of Limitations. But it was held by Kekewick, J., that though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest on the mortgage debt, the rights of the trustees of the mortgage were not barred, and that the fact of the rents being payable to one set of trustees, and the interest being payable to another set of trustees, did not alter the case, when the *cestui que trust* was in each case the same. At p. 612 Kekewick, J., thus summarizes the position of Mrs. Sharp.

I think that in this case the court ought to presume that Mrs. Sharp did that which any reasonable person would have done, and said, "I being entitled to receive, I being in fact for all interests and purposes liable to pay, I will not have time and trouble and expense wasted in passing money or documents from hand to hand; I shall remain in possession, I shall take the rents and profits, and the result is, I shall not get the interest on the mortgage debt *qua* interest, but I shall get it *qua* rents and profits." That seems to be the fair conclusion from the circumstances. It is, I think, supported by *Burrell* v. *Earl of Egremont*, 7 Beav. 205, and not controverted by any other case cited or any principle on which the court administers justice between parties.

NOTES OF CANADIAN CASES.

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QUEEN'S BENCH DIVISION.

Divisional Court.]

CANADA LOCOMOTIVE CO. v. COPELAND.

Schooner carrying cargo of coal late in fall of 1883 from Sandusky to Kingston was injured by stress of weather on Lake Erie. The cargo was unloaded to repair the vessel, and the coal could not be delivered till the spring of 1884. The master of the vessel tendered the coal to the consignees at Kingston on arrival of the vessel there, and the consignees refused to accept it, disclaiming all title to it, asserting that the consignors or insurers must assume it. The master also refused to deliver the coal unless upon payment of a larger sum for freight than he was entitled to.

The coal was by consent of parties unladen on the consignees' wharf, they receiving it as wharfingers. It was afterwards sold by consent of parties, and the consignees became the purchasers of it.

Held, the shipowners were entitled to charge for unloading, selling and delivering the coal, and to their proper freight charges, although the master had refused to deliver it unless he was paid a higher freight, for the consignees refused, in any case, to accept the coal as consignees or purchasers.

Osler, Q.C., for motion.

Britton, Q.C., contra.

COMMON PLEAS DIVISION.

Div. Ct.]

CLARKSON v. STIRLING.

Bankruptcy and insolvency—Insolvency—Preference—Evidence.

On 19th December, 1885, a transfer of certain book debts was made by the firm of B. & W., in pursuance of the terms of a contract entered into therefor on 16th August, 1884, between the firm and defendant, whereby in consideration of defendant lending the firm $15,000, which was to be repaid at any time after six months' notice, with interest in the meantime at 10 per cent., the firm were to employ defendant as a clerk at a salary of $2,000 a year. The firm subsequently made an assignment for the benefit of creditors to the plaintiff, who sought to set aside the contract as giving, or having the effect of giving, the defendants a preference over the other creditors, and that at the time of the transfer the firm were insolvent and unable to pay its debts in full.

Held, on the evidence the firm were not insolvent at the time the agreement was entered into; and that the agreement was valid.

Maclennan, Q.C., for the plaintiff.

George Kerr, Jr., and *Duggan*, contra.

Div. Ct.]

BATE v. CANADIAN PACIFIC RAILWAY.

Railways—Defective construction — Negligence—42 Vict. ch. 9, sec. 15 (D.), applicability of.

The road bed of the defendants' railway was on an embankment about fifteen feet high, built on the sloping side of a rock, which sloped into a muskeg or small lake, the embankment being made by the side of the rock being filled in with loose sand, which had no cohesion, and without any retaining wall to keep the sand from slipping. The sand slipped off the side of the rock into the muskeg, and the train on which the plaintiff was travelling on arriving at the place in question was thrown into the cavity caused by the sand so slipping, whereby the train took fire and the plaintiff's baggage was burnt. This part of the road had been in existence about seven years, and had been built by contractors under the Government before the defendants acquired the road, and it was not shown that the defendants had any notice or knowledge of any defect.

By 42 Vict. ch. 9, sec. 25 which is headed "working of the railway," it is enacted that the trains shall be started and run at regular hours, etc., and shall furnish accommodation for transportation of goods and passengers, etc., such goods and passengers to be taken, transported and discharged at, from, and to, such places on the due payment of the due toll, freight, or fares, etc.; and the party aggrieved by any neglect or refusal in the premises shall have an action therefor against

the company, from which action the company shall not be relieved by any notice, condition or declaration, etc., if the damage arises from any negligence or omission of the company or its servants.

The defendants gave the plaintiff a ticket at a reduced rate, on which was printed a condition relieving the company from liabilities beyond $100.

Held (ROSE, J., dissenting), that sec. 25 only applied to negligence in the management, etc., of the train, and not to defective construction; and therefore the defendants, under the circumstances, could avail themselves of the condition.

Per ROSE, J., there was, and *per* CAMERON, C.J., there was not evidence of negligence to go to the jury.

Osler, Q.C., and *Wallace Nesbitt*, for the plaintiffs.

Robinson, Q.C., and *G. H. Watson*, for the defendants.

Div. Ct.]

CARR v. FIRE INSURANCE ASSOCIATION.

Insurance—14 Geo. III., ch. 78, sec. 83—Application to Ontario—Notice by first mortgagee to rebuild.

A mortgage was made by T. H. C. and B. H. C. to D. of certain lands which contained a covenant to insure. A second mortgage was made by the same parties to the Bank of Toronto for securing a large indebtedness to the bank, which also contained a covenant to insure. At the time of the first mortgage there was an insurance for $1400 which was allowed to lapse, and on the bank discovering this, their manager procured T. H. C. to effect an insurance, advancing the amount to pay the premium, charging T. H. C.'s account with the amount, and discounted a note made by T. H. C. and endorsed by B. H. C., the plaintiff herein to cover the same. The policy was to T. H. C. alone, and was on saw mill, $400; on fixed and moveable machinery, shafting, gearing, etc., $1000; on boiler and connections, $100; and on engine and connections, $500. Loss, if any, payable to the bank. On a fire occurring and the property being burnt, D. required the insurance company to expend the insurance moneys as far as they would go in rebuilding the insured premises.

Held, doubting, but following *Stinson* v. *Pennock*, 14 Gr. 604, that the 14 Geo. III., ch. 78, sec. 80, was not merely of local application, but extended to this Province, and that it applied to a case like the present one; but

Per CAMERON, C.J., it only applied to the amount insured on the building, and did not extend to a distinct insurance on fixtures or machinery.

Per ROSE, J., that it covered the fixtures or machinery, etc.

Dalton McCarthy, Q.C., and *Pepler*, for the plaintiffs.

Strathy, Q.C., for the defendants.

Div. Ct.]

DOMINION LOAN AND SAVINGS SOCIETY v. KILROY.

Husband and wife—Separate business—Property of wife.

K., about six years before the trial of this action, had failed in business and become insolvent. The plaintiffs recovered a judgment against him in respect of a debt contracted before his failure. About three years afterwards he made an arrangement with a wholesale firm to supply goods to the wife upon her own credit and responsibility. The wife had no capital of her own. The business was managed solely by the husband, under a power of attorney from the wife, who took no part whatever in the same, and was at first carried on in premises owned by K., subject to a mortgage, for which she neither paid rent nor agreed to do so, but subsequently in premises leased by the wife. These goods were sold, and further goods from time to time purchased. The plaintiffs having seized the goods under an execution issued on them judgment against K.

Held (ROSE, J., doubting), that the goods were the property of the wife and not of the husband.

Osler, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

[Rose, J.

DOMINION BANK v. COWAN.

Bankruptcy and insolvency—"Unable to pay debts in full"—"Insolvent circumstances," meaning of.

There is no wider meaning to be given to, the words "unable to pay his debts in full," than to "insolvent circumstances"; but both expressions refer to the same financial condi-

tion, that is, to a condition in which a debtor is placed when he has not sufficient property subject to execution, to pay all his debts, if sold under legal process at a sale fairly and reasonably conducted.

The fact that all the assets are either mortgaged or under warehouse receipts is not alone sufficient to render a debtor insolvent.

McGee, for the plaintiffs.

G. T. Blackstock, for the defendant.

[O'Connor, J.

REGINA v. COLLINS.

Canada Temperance Act, 1878—One justice in summons—Charge laid before two—Waiver—Week—Computation of time.

The summons for an offence under the Canada Temperance Act, 1878, stated that he was charged with the offence before one justice. The information in fact was taken before two justices, one of whom issued the summons. The defendant appeared on the summons when the two justices were present raised no objection, and the defendant was tried and convicted.

Held, no objection could now be raised.

Sec. 46 of the Act provides that the hearing may be adjourned to a certain time and place, and no such adjournment shall be for more than one week.

Held, that the week must be computed as seven days exclusive of the day of the adjournment.

Aylesworth, for the Crown.

Masten, contra.

[O'Connor, J.

FAWCETT v. WINTERS.

Referee—Report—Effect of—Reasonable and probable cause—Evidence.

The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions; and he need not give the reasons or his findings.

The referee found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that this was a finding of law and not of fact. The referee was a barrister.

Held, that this was equivalent to a verdict for the plaintiff rendered by a jury under instruction by a judge of what would be evidence of want of reasonable and probable cause; and on the evidence the findings could not be interfered with.

Holman and *Birney*, for defendant

H. J. Scott, for the plaintiff.

[Galt, J

CLAYTON v. MCCONNELL.

Building contract—Termination of.

In a building contract the defendant refused to pay the full amount due according to the terms of the contract, and caused the plaintiff delay in not having the joists ready at the proper time for plaintiff's use, and when asked for more money the defendant told plaintiffs to go on with their work, or, if they would not go on, to leave the building.

Held, that the plaintiffs were entitled to consider the contract at an end, and entitled to recover any balance that might be due them.

Roaf, for the plaintiff.

Lash, Q.C., for the defendants.

[Wilson, C.

REGINA v. MCAULAY.

Indians, selling liquor to—Sale by wife—Service on wife—Conviction of husband—Jurisdiction of Indian agent.

An information for selling liquor to certain Indians, giving their names, but without describing them, of any particular tribe or locality, was laid by R., of the township of Rama, before D. M., "an Indian agent by royal authority duly appointed," and alleged that defendant and Fanny his wife, or one of them, did on, etc., sell, etc., to the said Indians spirituous liquors contrary to the statute, etc. The summons issued thereon described D. M. as Indian agent, and shewed it was issued at Rama township. It was directed to defendant and his wife, who were described as of the township of Rama, and was served personally on the wife, and a copy left with her at their most usual place of abode for the husband This was proved by an affidavit of service. The enquiry was held at Rama before D. M.,

as Indian agent, and he subscribed the different depositions as Indian agent of the Chippewas of Rama, and *ex officio* justice of the peace. The conviction was that on, etc., "at Rama Indian Reserve, in the township of Rama," the defendant "is convicted before D. M., Indian agent for the Chippewas at Rama, and *ex officio* justice, a J.P. for the purpose, and under the Indian Act of 1880, for that he did on, etc., at the township of Rama, unlawfully sell to certain Indians, to wit (naming them), intoxicating liquor, to wit, whiskey, etc." The warrant of commitment recited that the conviction was before D. M., as Indian agent of the county of Ontario. The liquor was sold at the defendant's hotel in the township of Rama by the defendant's wife, the husband being away at the time, and for some time afterwards. He stated he knew nothing of the summons having been issued, or of the proceedings thereon, and never authorized any one to act for him. There was nothing said to D. M. to shew why defendant was not present at the enquiry, and D. M. had no reason whatever to believe that the case was other than a neglect or refusal to attend.

Held, that the service was regularly made and duly proved before the Indian agent, and he was justified in proceeding to investigate the charge; and that the act of the wife was in law that of the husband, and that he could be convicted therefor.

Quære, whether D. M.'s appointment was as an Indian agent of the Chippewa Indians of Rama, or for the county of Ontario; but the latter might include the township, and so give him jurisdiction; but in any event the conviction could not be supported, for it did not appear that the Indians to whom the liquor was sold were Indians over whom the agent had jurisdiction; for it did not appear that they were Chippewa Indians, Indians residing in the township or even in the county.

The discharge of the defendant was therefore granted; and so far as necessary, and as there was power to do so, no action was to be brought against the Indian agent.

George Bell, for the motion.

Aylesworth, contra.

[Robertson, J.

RE CLARK AND CORPORATION OF HOWARD.

Drainage by-law—Assessing lands benefited—Alteration of assessments.

A by-law was passed to provide for the repairing and cleaning out a drain constructed under a prior by-law, and to make the assessments more equitable. The engineer was limited in making his assessments to the lands only which were included in the original by-law. In his report he stated that great injustice would be inflicted by his limited instructions being carried out, and that a large area of land which would be benefited by the work would escape assessment. The council, notwithstanding, passed the by-law in the limited form. There was an appeal to the Court of Revision against the assessments, and the court altered some of the assessments by deducting amounts therefrom and placing the amounts thus deducted on other assessments without making a *pro rata* variation on all the assessments.

Held, that the by-law was bad and must be quashed.

M. Wilson, for the applicant.

Pegley, for the corporation.

[Rose, J.

REEVE v. THOMPSON.

Landlord and tenant—Notice to quit—Action for possession.

In July, 1880, M. conveyed the land in question to the plaintiff. At the time of the conveyance the defendant was tenant from year to year under M. of lands which included the lands in question, under a tenancy in force since 1868. The defendant had no knowledge of the conveyance to the plaintiff at the time it was made. In December, 1880, the plaintiff executed what purported to be a statutory lease of the lands in question. The *habendum* was, "during the term of the occupancy as tenant of the lessee of said defendant of the lands leased to him, the said term to be computed from the 2nd July, 1880, and from thenceforth next ensuing and fully to be complete and ended, as soon as the said lessee shall vacate the said premises or cease to reside thereon."

The rent reserved was 20 cents, payable on the 1st July, 1880, in each and every year. The defendant continued to pay rent to M. and never was called upon to attorn or to pay rent to plaintiff, and received no notice to quit from M. prior to action brought and no demand of possession from the plaintiff until about the commencement of this action, In 1886 the plaintiff and defendant had a dispute about the plaintiff's boundary line, but defendant did not dispute plaintiff's title. The defendant claimed that the conveyance to the plaintiff did not affect his rights under his lease. The plaintiff, claiming that he was entitled to the possession of the land in question, brought an action therefor against the defendant.

Held, that the defendant was entitled to the possession until he received proper notice to quit.

Walkem, Q.C., for the plaintiff.

Macguire, Q.C., for the defendant.

Rose, J.]

THE BANK OF MONTREAL v. STEWART.

Action for possession of land—Mortgage—Foreclosure—Trust—Statute of Limitations.

The plaintiffs claimed the possession of certain land under a final order of foreclosure obtained on a mortgage to the plaintiff made by W. S., a brother of the defendant. The defendant set up that W. S. was merely a trustee for him, and that he was entitled to the land under the trust, and also by the Statute of Limitations.

Held, that the evidence failed to establish the defendant's contention, and the plaintiffs were entitled to recover.

Hudspeth, Q.C., for the plaintiffs.

Lount, Q.C., and *Stewart*, for the defendant.

CHANCERY DIVISION.

Rose, J.] [March 19.

MCCASKILL v. RODD.

Illegal distress—No rent reserved—2 Wm. & M., sess. 1 c. 5, s. 5—Double value.

In an action for illegal distress in which the learned judge who tried the case found that the plaintiff occupied the premises in question under an agreement with the defendant, by the terms of which no rent was payable by the plaintiff to the defendant, and that the distress was therefore illegal, plaintiff's counsel asked for double the value of the goods as damages under 2 Wm. & M. sess. 1 c. 5, s. 5.

Held, that the 5th section of the statute, by reference to the 2nd section, does not extend to a holding of land when there is no rent reserved, and that the plaintiff was not entitled to double value.

J. A. McGillivray, for plaintiff.

D. J. McIntyre, for defendant.

Boyd, C.] [May 27.

PRATT v. THE CORPORATION OF THE CITY OF STRATFORD.

Municipal corporation—Jurisdiction over streets—Absence of by-law for the work—Damage to adjacent owners—Remedy by action or arbitration—46 Vict. c. 18 (O.).

The plaintiff was the owner of certain premises which were injuriously affected by the raising of the street by the defendants in building a bridge and its approaches, brought an action for damages.

Held, that he could not avail himself of the absence of a by-law for the construction of the bridge in order to proceed by way of an action for damages, that his remedy was under the arbitration clauses of the Consolidated Municipal Act, 1883, 46 Vict. c. 18 (O.), for compensation, and his action was dismissed with costs.

An owner of land has by common law no vested right to the continuance of the highway at the level it was when he purchased.

The corporation, as owners or trustees for the public, have the right to repair and im-

prove streets and bridges without a by-law for that purpose.

Cassels, Q.C., and *Pennyfather*, for the plaintiff.

Idington, Q.C., for the defendants.

Ferguson, J.] [June 13.

MOVERS v. GOODERHAM.

Contract for sale of cargo of rye — Action for price — Breach of implied warranty that rye sound and merchantable—Acceptance —Caveat emptor—Return of goods—Rescission of contract —Damages.

The plaintiffs sold a cargo of rye to the defendants to be delivered at a future time at the defendant's dock in Toronto. At the time of its delivery it was inspected by an inspector employed by the defendants, and pronounced by him to be sound so far as he could inspect it. Subsequently, as it was being unloaded into defendant's elevator, it was found to be damaged. In an action for the price in which the defendants set up an implied warranty that the rye would be sound and merchantable, and a breach thereof, and the plaintiffs contended there was an acceptance of the rye, and that, as there was an opportunity for inspection at Toronto, the maxim *caveat emptor* applied. The defendants contended that as there was no opportunity to inspect at the time of the contract, and no subsequent waiver, the opportunity in Toronto was immaterial as long after the contract of sale.

Held, that there was an implied promise on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye," and that the maxim *caveat emptor* did not apply, and that there was a breach of the warranty contained by implication in the contract: *Jones* v. *Just*, L. R. 3 Q. B. 197, cited and followed.

The breach of the warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and is no defence to an action by the seller; but evidence may be given of the breach of the warranty in reduction of damages.

Walkem, Q.C., and *J. B. Walkem*, for the plaintiffs.

T. P. Galt, and *T. G. Blackstock*, for defendants.

Boyd, C.] [June 28.

RE DENNIS.

DOWNEY ET AL. v. DENNIS ET AL.

Will—Devise—Sale by trustees directed if wished by majority of heirs—Consent of majority—Application by minority for partition.

J. C. died in 1867, having by his will provided as follows: "And whereas trouble . . may arise among my family with regard to the property . . . on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize, at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living to do so, and not otherwise, etc." In 1887 a meeting of a large majority of those interested was held, and it was decided to sell by public auction.

On an application by the plaintiffs who were trustees for one of the heirs, and represented only ⅛ share of the property, for the usual court order for partition and sale, which was resisted by a majority of the heirs, it was

Held, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted.

J. Maclennan, Q.C., for the plaintiffs.

Lash, Q.C., and *J. R. Roaf*, for the defendants.

John Hoskin, Q.C., for the infants.

Boyd, C.] [June 30.

PEGG v HOBSON.

Mortgage—Action on covenant — Mortgagee becoming owner—Extinguishment.

In an action on the covenant for payment in a mortgage, for the amount of the deficiency, after the exercise of a power of sale, defendant set up the sale under the power to one W., and a retransfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land.

Held, on demurrer, no defence.

E. B. Brown, for the demurrer.

W. M. Douglas, contra.

Div. Ct.] [June 24.

NORMAN v. HOPE.

Replevin—Action against sheriff for taking insufficient bond—Damages recoverable therein—R. S. O. c. 53, s. 11—R. S. O. c. 1, s. 8, subsec. 18.

Judgment of ARMOUR, J., reported, 13 O. R. 536 affirmed.

Lash, Q.C., for the defendant.

Langton, for the plaintiffs.

Div. Ct.] [July 5.

CAMERON v. CAMERON.

Misrepresentation—Bona fides—Actual fraud—Conveyance executed—Rescission—Cancellation.

H. D. C. agreed in writing with C. C. on January 17th, 1882, to sell to him Lots 37 and 39 for $5,450, payable $1,791 on the delivery of the deed and upon the title to Lot 37 being found satisfactory to C. C. or his solicitor, and upon a quit claim deed of Lot 39 being delivered, the balance to be secured by mortgage, said sale to be completed within thirty days, otherwise the deposit of $25 to be forfeited. H. D. C. *bona fide* believing such to be the case, represented to C. C. at the time of the sale that a patent from the Crown had issued for Lot 37, and relying on this representation H. D. C. entered into the agreement, and afterwards verbally agreed to sell Lot 37 at a large advance to one R. On February 10th, 1882, the conveyance was executed, the bulk of the purchase money, $4,025, having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of a mortgage. It afterwards appeared that no patent had ever issued for Lot 37, and notwithstanding the efforts of H. D. C. and C. C. it was not till April 25th, 1883, that the department at length issued a patent, and then, only for four chains of the lot, leaving ninety links outstanding. In February, 1883, H. D. C. had told C. C. that he would not keep the property, that by reason of no patent having issued R. had withdrawn from his offer, and he demanded his money back with his actual expenses incurred. C. C. refused to cancel the sale, and H. D. C. now took these proceedings to have the sale rescinded and the deed delivered up to the chancellor.

Held, that there having been no actual fraud and the deed of conveyance having been executed, the plaintiff could not have the relief sought for.

Wilde v. *Gibson*, 1 H. L. C. 605, and *Brownlee* v. *Campbell*, 5 Ap. Cas. 925, *Holland*, *Hart* v. *Swaine*, 7 Chy. D. 42, considered.

McCarthy, Q.C., for the plaintiff.

Moss, Q.C., and *Witherspoon*, for the defendants.

Div. Ct.] [July 5.

REGINA v. BRIERLY.

Bigamy—R. S. C. c. 161, s. 4.—Second marriage contracted abroad by British subject resident in Canada — Ultra vires — Evidence — Proof of foreign law—Proof of second marriage.

Held, that R. S. C. c. 161, s. 4, which enacts that every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony, provided that the person who contracts such second marriage is a subject of Her Majesty, resident in Canada, and leaving the same with intent to commit the offence, is not *ultra vires* the Dominion Legislature, either as being repugnant to Imperial legislation or on any other grounds.

Per BOYD, C.—This statutory law is nearly half a century old, it has been confirmed by the courts, passed upon more than once by competent colonial legislatures, and ratified by the express sanction of the Imperial Parliament, and Her Majesty in person.

In order to prove the second marriage which took place in Michigan, the evidence of the officiating minister was tendered, who showed that during the last twenty-five years he had solemnized hundreds of marriages; that he was a minister of the Methodist Church; that he understood the laws of Michigan relating to marriage; that he had been all the while resident in Michigan; that he had communications with the Secretary of State regarding these laws; and that this so-called second marriage was solemnized by him in

Michigan according to the marriage laws of the State.

Held, that this evidence was admissible in proof of the validity of the second marriage, and was sufficient proof of the same, even assuming that such ought not to have been presumed.

Per BOYD, C.—In the case of a second marriage, it is not essential to prove the foreign law n the case of British subjects, such as were in question in this case.

W. R. Meredith, Q.C., for the prisoner.

J. R. Cartwright, for the Attorney-General of Ontario.

[The Attorney-General of the Dominion was notified, but did not appear.—ED. L. J.]

Div. Ct.]

AMBROSE v. FRASER ET AL.

Husband and wife—Covenant running with the land—Assignment of the reversion by the lessor to his wife—Set-off.

Judgment of FERGUSON, J., reported 12 O. R. 459, affirmed with costs.

Per BOYD, C.—Privity of estate is not tantamount to privity of contract in order, without more, to affect the separate estate of a married woman as if she had expressly contracted with reference thereto. There is no right therefore to fix liability for the amount claimed herein upon the separate estate of the defendant Amelia Fraser.

Moss, Q.C., for the plaintiff.

Osler, Q.C., for the defendants.

REVIEWS.

STATUTES OF THE PROVINCE OF ONTARIO. Passed in the session held in the fiftieth year of Her Majesty Queen Victoria.

We have received from the Queen's Printer for Ontario, a copy of the Statutes of the last session. We have already in a former issue referred at length to most of the statutes of public importance comprised in this volume. Chapter 16, which was not published in the *Gazette*, we see provides for the introduction of the Torrens system of registration of titles into the Districts of Algoma, Thunder Bay (including Rainy River), Muskoka, Parry Sound and Nipissing, and practically makes the system compulsory as regards all newly patented lands. The operation of the Act is, however, suspended until the revision of the statutes now in progress is complete.

A NATIONAL ANTHEM.

We have been favoured by our veteran friend and oft contributor, Mr. G. W. Wicksteed, Q.C. of Ottawa, with a copy of a National Anthem composed by him for Canada. It is an animated effusion, in a broad and generous tone, and when set to suitable music deserves to become popular. Mr. Wicksteed has also sent us a copy of an ode to Her Majesty on the occasion of her jubilee; both compositions are marked by good taste and elegance of expression.

FOURTH ANNUAL REPORT OF THE INSPECTOR OF LEGAL OFFICES FOR THE YEAR 1886.

The annual report of Mr. John Winchester, the Inspector of Legal Offices, for the year 1886, contains a good deal of statistical information which is deserving of consideration. On the whole we think it indicates, in spite of the croakers, that during the year 1886 the country was in a fairly prosperous condition. One of the tests by which this may be estimated is the amount of work the sheriffs do in the way of realizing claims on executions. It appears from the report that 4219 writs, indorsed to levy $2,856,155.12, were received by the sheriffs, and of these only 315 resulted in a sale of goods producing $76,555.91, and only 90 in a sale of lands producing $18,251.76, while $125,687.06 was realized by the sheriffs without actual sale. Thus of the $2,856,155.12 indorsed

to be levied, $220,494.73 was actually recovered under execution, or a trifle less than ten per cent. of the whole amount. How many of the executions were settled without the intervention of the sheriff it is of course impossible to say, but as in only about ten per cent. of the cases did the sheriff sell, it would appear that in the other ninety per per cent. of cases the debtors were so impecunious that they had no property available in execution, or that they effected a settlement before sale. Turning to the table showing the number of actions commenced in the High Court during the year, we find that in the Q. B. and C. P. Divisions 4,037 writs of summons issued, and in the Chancery Division 2,025, making a total of 6,062. The number of judgments entered after trial was only 454, while 1,069 judgments were entered without trial. The litigated suits are therefore not quite eight per cent. of the whole number; a large proportion of the remaining cases, we presume, must have been settled between the parties. The returns of judgments entered are however incomplete, and do not include the County of York. In the litigated cases it appears that the total amount of costs taxed was $40,230.90 in the Q. B, and C. P. Divisions, and $14,834.25 in the Chancery Division, making a grand total of $55,065.15, and of this sum $27,849 or more than half was for disbursements. In the non-litigated cases the total amount of costs taxed appears to have been $23,640.68 in the Q. B. and the C. P. Divisions, and $9,499.70 in the Chancery Division, making a total of $33,140.38; but of this sum $11,543.39, or rather more than one-third, was for disbursements. These figures appear to us very conclusively to demonstrate, if any such demonstration be needed, either that the fees of court are altogether too high or that the remuneration of solicitors is altogether too low. It is surely unreasonable that for every dollar earned in a litigated case the solicitor should have to disburse a dollar; and that in non-litigated cases for every sixty-six cents earned he should have to disburse thirty-three cents. These facts are deserving the attention of the judges and the Attorney-General when they come to frame the long expected tariff of disbursements.

FLOTSAM AND JETSAM.

STATUTES OF THE DOMINION.

A table of the statutes of the Dominion of Canada and the British North America Act, 1867, showing the acts they amend or affect, or by which they are amended or affected, has just been issued from the Parliamentary printing office. This index has been prepared by Dr. R. J. Wicksteed, barrister at law, in the Law department of the House of Commons. The work has been entirely voluntary on his part, and for which, as in many similar cases, he receives no extra pay from the Government. This public spirited action on his part is all the more commendable when it is remembered that Dr. Wicksteed was, as he considers most unjustifiably, passed over when promotions were taking place in his office, in order to make way for an undeserving protege of the Hon. Mr. Chapleau. The index is a volume of one hundred and sixty pages. It contains information not to be found elsewhere, and will be found most invaluable to members of parliament and members of the legal profession.—*Ottawa Free Press.*

BARBED WIRE FENCES.—A sharp controversy concerning barbed wire fences has recently been terminated in the Supreme Court of New Jersey. The defendant owned a field fenced with barbed wire, and the plaintiff kept in an adjoining pasture a valuable colt, which, coming into contact with the barbed wire, was so badly injured that it had to be killed. It seems that the argument of the case, like the subject-matter, was quite pointed, for the newspaper report says:—

Counsel for the plaintiff argued that the barbed wire fence was an invention of the devil, and was, therefore, entitled to no consideration in court. Judge Magil, in a measure, upheld him, declaring that the right and duty of the owner is to put up a suitable and proper barrier to prevent the incursions of his neighbour's cattle, and to keep within his own inclosure his own animals. But that right is subject to the duty which the owner, in common with every one else, owes to his neighbour; that duty is to so use his own property as to do no injury to the property belonging to another. The duty which the owner who erects a fence owes to his neighbour is a duty to be performed with reference to the use of the adjoining land; and if that use be in the way of pasturage for horses or cattle, it must be with reference to the habits of such animals in their disposition to break through, and no owner has a right to erect such a barrier, or to incorporate in it that which, in view of the natural habits and dispositions of such animals as would

naturally be kept on the adjoining land, would be dangerous and likely to produce injury. The judge held that the plaintiff is entitled to recover, although he had bailed his colt to the adjoining owner to be kept at pasturage, and although that owner knew of the existence of this wire fence.

If, however, the owner of the adjoining pasture in which the colt was domiciled had "joined fences," as they say in the West, with the owner of the barbed wire fence, or, in other words, if the wire fence was by agreement, express or implied, a partition fence, the ruling of the court could hardly be sustained, for the catastrophe was as much the fault of the owner of the colt, or his agent and bailee, as of the defendant himself. We will look with much interest for the full report of the case. The newspaper account of it concludes as follows:—

The case will doubtless be appealed, as the barbed wire manufacturers cannot afford to let such an injurious decision stand uncontested, if there is any hope of having it reversed. The plea will doubtless be set up that the barbed wire, from its cheapness, convenience and practicability is a necessity; that it is, with few exceptions, harmless, and that in this case nothing but the total depravity was at fault for the injury. The case will be watched with no little interest, and especially at the West, where barbed wire is used almost exclusively for fencing.—*Central Law Journal.*

AN OCULIST'S TEST.—In a large factory in which were employed several hundred persons, one of the workmen, in wielding his hammer carelessly allowed it to slip from his hand. It flew half way across the room, and struck a fellow-workman in the left eye. The man averred that his eye was blinded by the blow, although a careful examination failed to reveal any injury, there being not a scratch visible. He brought a suit for compensation for the loss of half of his eyesight, and refused all offers of compromise. The day of the trial arrived, and in open court an eminent oculist retained by the defence examined the alleged injured member, and gave it as his opinion that it was as good as the right eye. Upon the plaintiff's loud protest of his inability to see with his left eye, the oculist proved him a perjurer, and satisfied the court and jury of the falsity of his claim. And how do you suppose he did it? Why, simply by knowing that the colours green and red combined make black. He procured a black card on which a few words were written with green ink. Then the plaintiff was ordered to put on a pair of spectacles with two different glasses, the one for the right eye being red, and the one for the left eye consisting of ordinary glass. Then the card was handed him, and he was ordered to read the writing on it. This he did without hesitation, and the cheat was at once exposed. The sound right eye, fitted with the red glass, was unable to distinguish the green writing on the black surface of the card, while the left eye, which he pretended was sightless, was the one with which the reading had to be done.—*Central Law Journal.*

A SUBSCRIBER sends us a paper containing some details of a partition suit of elephantine proportions which has just been wound up in the county of Elgin. It appears that one William Boyce, who owned several hundred acres of land in the township of Bayham, died in November, 1878, leaving no children, consequently his real estate descended to his lawfu heirs. He had in his lifetime six brothers and one sister, all of whom had predeceased him, leaving heirs and heiresses extending down to the fifth and sixth generations. The plaintiff was the only heir in the county of Elgin, and he could not give any definite information, either as to the names or residences of the remaining heirs, and it fell to the lot of his solicitors to obtain the necessary information, that a petition for partition of the real estate might be filed in the County Court of the county of Elgin. A correspondence with the heirs who were known was commenced, and link by link the line of heirship was unravelled, until about 130 heirs and persons interested in the real estate were discovered. Of this large number only twelve were found in Ontario sixty being in New York State, two in Massachusetts, three in Connecticut, three in Dakota, ten in Montana, one in Michigan, fifteen in Pennsylvania, and the remainder were scattered throughout Wisconsin, Ohio, and Minnesota. Fifteen infants appeared as defendants, the youngest of whom was only ten months old, and its share, amounting to fifty cents, will remain in Court until it attains the age of twenty-one years. Two claimants were women who had been divorced from their husbands, and several were spinsters, with ages ranging anywhere between forty and seventy years. The largest share of the estate to which any one heir is entitled is a 147th, and the smallest is a 1178th. Three heirs each receive the last mentioned share, while ten claimants rejoice in a 560th share each. Six of the heirs have died since the suit was commenced. One fell in the fire and was burned to death, and another committed suicide. In order to completely establish the heirship of many of the claimants, monuments, tombstones, and slabs had to be carefully inspected. Many quaint epitaphs were discovered, especially in the old cemeteries near the Catskill Mountains.

Canada Law Journal.

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DIARY FOR OCTOBER.

1. Sat.....Wm. D. Powell, 5th C. J. of Q. B., 1816.
2. Sun.....*17th Sunday after Trinity.*
3. Mon.... C. C. term and sittings for trial of non-jury cases begin (except in York).
7. Fri.....Henry Alcock, 3rd C. J. of Q. B., 1802.
8. Sat.....C. C. term (except in York) ends. R. A. Harrison, 11 C. J. of Q. B., 1875.
9. Sun.....*18th Sunday after Trinity.*
10. Mon.....C. C. term begins.
13. Thur....Battle of Queenston, 1812. Lord Lyndhurst died, 1863, æt. 92.

TORONTO, OCTOBER 1, 1887.

MR. JUSTICE GROVE has retired from the English Bench after sixteen years' service. Mr. Arthur Charles, Q.C., has been appointed his successor, and the appointment meets with general approbation. The new judge is in the prime of life, having been born in 1839.

NOT the least important change wrought by the Judicature Act is that which it has effected in the nature of the qualifications which it is now necessary for those to possess, who would aspire properly to fill the judicial office. Time was, when a man fairly versed in the common law and the criminal law might hope to make a reasonably good judge, and to satisfactorily discharge all the duties that he would be called on to perform in his judicial capacity, even though he might be supremely ignorant of the first principles of equity jurisprudence. So on the other hand a man well versed in equity, though ignorant of the practical workings of the common, and criminal, law, might nevertheless aspire to shine as a great equity judge. The subdivision of the law, formerly so acutely defined, no doubt had this advantage, that it permitted men to become more profoundly skilled in that particular branch of law to which they devoted themselves. Notwithstanding the recent fusion of law and equity, and the amalgamation of the courts, English jurisprudence is, in spite of all attempts at its simplification, still so vast and complicated a system, dealing as it does with all the intricacies arising from a highly civilized social system, that from its very nature, few men can hope to have the capacity to thoroughly master every branch of it in all its details. And yet this is the burthen which is now laid upon every man who aspires to judicial honours. Few men at the Bar, in the generation of lawyers now passing away, have adequately filled the rôle of first class "all round" lawyers, if we may use the expression—the late Chief Justice Moss perhaps alone excepted; and it is perhaps too much to expect that the coming generation will be more productive of such versatile intellects.

What then is likely to be the future of the Bench in this Province? Are we to expect to see men whose training has been exclusively confined to the principles of equity struggling, after they have attained the bench, to master criminal, and common law; or, on the other hand, men who have confined their attention to criminal law, groping their way through the mysteries of equity jurisprudence? It is to be hoped not. At the same time we may be sure that the Bench will be but a reflex of the Bar, and it will be necessary, if this result is to be avoided, for the members of the Bar to give up the system heretofore in vogue, of confining their attention to one particular branch of law. Those who aspire to the Bench must remember that the old sys-

tem has passed away, that if they would discharge the judicial office with effect, and so as to command respect, they must be familiar with every branch of law with which they may have to deal judicially; and that now to ascend the Bench with adequate knowledge of but one branch of law, is like a soldier going into battle with but one leg, or one arm.

There is danger that the attempt to widen the field of legal study may result in the acquirement of a shallower and more superficial knowledge of the subject than is attained by those who restrict their researches to a narrower field; and we may have a generation of lawyers more widely informed than their predecessors in the law as a whole, though less accurately versed in particular branches of the law. Whether this will be beneficial to the community at large, time alone can tell.

Another, and a serious matter affecting the future status of the Bench, is the question of remuneration. Ominous rumours have reached us that a high judicial functionary in the zenith of his powers and usefulness, is seriously contemplating retiring from the Bench, and resuming practice at the Bar, simply on account of the inadequacy of his official pay. Such a step, we do not hesitate to say, would be a public calamity, and even the bare possibility of such a proceeding is greatly to be deplored. The retention of the salaries of the judges at their present figure is justified, we believe, on the ground that it is found that men can be got who are willing to accept the office at the present remuneration. This is, however, really an argument for the reduction of the salaries to half their present amount, for we are quite sure if they were reduced by one half to-morrow, we could within twenty-four hours find respectable men to fill every vacant post at the reduced rate. We would not answer, however, for their judicial ability, nor guarantee that they would be the best men to make judges. It is notorious that the present salaries are not sufficient to tempt the most competent men; and if the leaders of the Bar, the men who have established reputations for learning and ability, cannot be tempted to take judicial office merely on the ground of the insufficiency of the pay, then it will inevitably come to pass that the Bench as a whole will become inferior in capacity to the Bar, to the grievous detriment of litigants, and the public interests.

IT is somewhat curious that although twenty-eight years have elapsed since our first Married Women's Property Act was passed, it was only the other day, for the first time, that the question came before the courts as to the effect of the existence of a marriage settlement on the operation of the Act.

It will be remembered that the Act of 1859 (C. S. U. C. c. 73) provided (section 2) that "every woman, who on or before the 4th day of May, 1859, married *without any marriage contract or settlement* shall and may, from and after the 4th May, 1859, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is on the 4th day of May, taken possession of her husband by himself or his trustee, and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts, etc., etc." It is obvious that a question might arise upon the construction of this Act, as to the effect of the words we have italicized. And yet, strange to say, notwithstanding all the litigation which has arisen under the Statute, the precise effect of these words seems never to have been called in question until the case of *Dawson* v. *Moffatt*, 13 O. R. 170. In

that case a contest arose between the creditors of a husband and his wife, who had married in 1842 with a settlement; as to the right of the wife to certain property purchased by her in 1876. It was claimed by the creditors, that the wife having married with a settlement the property in question, having been purchased by her after marriage, became the husband's property, and therefore his creditors were entitled to seize it for the payment of their debts. The property in question was a debt due to the husband which the wife had purchased from her husband's assignee in insolvency; the husband had subsequently sued for, and recovered the debt, which was at the time in court. The fund was unaffected by the marriage settlement. It was argued for the creditors, that the existence of the settlement deprived the wife of the benefit of the Act of 1859, but the learned Chancellor having regard to the provisions of section 19, and what he considered the scope of the Act, came to the conclusion, that the existence of the settlement did not prevent the application of the Act to property subsequently acquired by the wife, and not affected by the settlement.

The 19th section reads as follows: "Nothing in this Act contained shall be construed to prevent any *ante* nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed; but notwithstanding any such contract or settlement, any separate real, or personal property, of a married woman, acquired either before, or after marriage, and not coming under, or being affected by, such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings, and any acquisitions therefrom, such woman shall be considered as being married without any marriage contract or settlement."

We are disposed to think that the distinction between marriages which had taken place before the passing of the Act of 1859, and those which have taken place subsequent thereto, has been lost sight of in the case to which we refer. This point does not seem to have been taken at the Bar, nor was it referred to by the learned Chancellor, and yet it occurs to us, that in the application of the Act, there is a vital distinction between the two classes of cases.

It must be remembered that the Act of 1859 was the first step in the way of an attempt to alter the common law rights of husbands and wives. The hardships which the common law entailed were always open to mitigation by the contract of the parties, and marriage settlements were a very common way of securing to the wife separate rights of property. Now it is reasonable to conceive that the Legislature, in its attempt to give married women separate rights of property, would not pretend to interfere in the case of husbands and wives who had actually entered into contractual relations regarding their property: and in cases where an actual settlement existed between the parties, it might not unreasonably be thought to be a part of the agreement between them, that the wife's property, unaffected by the settlement, should pass to the husband as at common law. In such cases the parties had made their contract, and it is not unreasonable to think the Legislature should in such cases in effect say, We will not interfere,—and this in effect they seem to do, for the whole additional rights given by the 2nd section are predicated upon the fact that she, on whom they are conferred, has married "without a settlement." In such cases, the Legislature seeks to provide a

statutory settlement for married women who have no contractual settlement.

But then comes the 19th section which is said to modify the literal wording of the 2nd section. But we think, if carefully considered, it will be found that that section is clearly and indubitably intended to be confined to cases in which the marriage takes place after the Act of 1859. The first clause of the section obviously applies to future marriages, and the whole of the rest of the section refers to "such contract or settlement," *i.e.*, as we are disposed to think a "contract or settlement" made after the Act.

In the case of *Dawson* v. *Moffatt*, the marriage took place in 1842, and so far as the case turned upon the operation of the Married Women's Property Act, of 1859, we should think it ought to have been decided as though that Act had not been passed.

SELECTIONS.

ACCEPTANCE OF RISK FROM BREACH OF STATUTORY DUTY.

The case of *Baddeley* v. *Granville* has now been fully reported in the September number of the *Law Journal*, and fully sustains the statement of Wills, J., that it is of great importance. It removes one class of cases, at all events, beyond the reach of the controversy as to the effect of knowledge of the risk, in relation to the bearing of the maxim *volenti non fit injuria*, and negatives the application of *Thomas* v. *Quartermaine*. This, indeed, was a result foreshadowed by the judgments of Bowen and Fry, L.JJ., in that case, but their observations were *obiter*, while opposed to the opinion of the learned Master of the Rolls. "There may," said Bowen, L.J., "be concurrent facts which justify the inquiry whether the risk, though known, was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced." "Knowledge," said Fry, L.J., "is not of itself conclusive of the voluntary character of the plaintiff's actions; there are cases in which the duty of the master exists independently of the servant's knowledge, as when there is a statutory duty to fence machinery." Such a case was *Baddeley* v. *Granville*. There it appeared that a rule made under the Coal Mines Regulation Act, 1872, provided that a brakesman should be constantly present at the pit's mouth when men were going down the shaft. The plaintiff's husband was killed by reason of the absence of the brakesman during the night; but it was the usual practice at the mine, as the deceased knew, not to have a brakesman at the pit's mouth during night. Did *Thomas* v. *Quartermaine* apply, establishing that when an action will *prima facie* lie under the Employers' Liability Act, 1880, it is an answer if the servant has voluntarily taken upon himself the risks which proved fatal? Wills and Grantham, JJ., were of opinion that the maxim *volenti non fit injuria*, on which *Thomas* v. *Quartermaine* proceeded, had no application here, the injuries having been directly caused by the breach of what was equivalent to a statutory duty on the part of the manager and owner of the mine. The application of that doctrine, observed Mr. Justice Wills, "is to be watched with great care in each individual case;" there was the deliberate expression of opinion by two of the judges of the Court of Appeal that it did not apply in the case of a direct breach of a statutory obligation; and further, he added, "there is a great deal to be said on public grounds in favour of that view. In the first place a statutory obligation should be incapable of being got rid of in the future. In respect of the results of past breaches persons may come to what agreements they please. But there ought not to be any encouragement to a deliberate engagement between A. and B. that B. shall take no action for the future breach by A. of a law which is for the protection of B. I do not know whether that would be an illegal agreement as be-

ing against public policy. But it seems to me that it is contrary to public policy when the supposed agreement, in consequence of which the principle *volenti non fit injuria* arises and has to be applied, comes to anything like this, that the master agrees to employ the servant on the terms that the servant will waive breaches by the master of a statutory obligation, and will in that sense, and to that extent, connive at his disregarding a statute, the obligations of which are imposed for the benefit of others as well as of the parties to the agreement. A great deal is to be said in favour of the opinion that where an accident arises from the breach of a statutory obligation the maxim *volenti non fit injuria* ought not to apply. In the present case I follow that opinion, and hold that there having been a breach of a statutory obligation the maxim *volenti non fit injuria* does not apply, and that the case is taken out of the rule laid down in *Thomas* v. *Quartermaine*." But, see the maxim applied in such a case in *Senior* v. *Ward (infra)*.

We should add, however, that "contributory negligence" may be a defence in case of breach of a statutory duty: *Senior* v. *Ward*, 1 E. & E. 385, 28 L. J. Q. B. 139; *Caswell* v. *Worth*, 5 E. & B. 385, 25 L. J. Q. B. 121; *cf. Britton* v. *G. W. Cotton Co.*, L. N. 7 Ex. 130, and *Holmes* v. *Clarke*, 7 H. & N. 937. "But the doctrine of *volenti non fit injuria*," as Bowen, L.J., put it in *Thomas* v. *Quartermaine*, "stands outside the defence of contributory negligence, and is in no way limited by it." But the mere knowledge of the plaintiff under the circumstances in *Baddeley* v. *Granville* would not have established such a defence, any more than the knowledge of the plaintiff in *Thomas* v. *Quartermaine*. Would there have been contributory negligence, then, if Baddeley had merely trusted that the banksman was on duty, and had worked on without examining for himself as to the risk incurred? *Senior* v. *Ward (ubi supra)* and *Woodley* v. *Metropolitan Ry. Co.* (2 Ex. D. 384) may be referred to; but a case of more resemblance is *M'Inally* v. *King and others* (24 Sc. L. R. 15). In that case, where it appeared that labourers had been engaged in undermining a bank of clay in a quarry when the clay slipped down and killed one of them, the Scottish Court of Session held—on a proof that it was the duty of the employer, according to the practice of the work, to have a watchman to warn the workmen of signs of a fall, but that none had been set, and in consequence the accident had happened—that the deceased was not guilty of negligence contributing to the accident in having trusted that a watch would be set, and worked on without examining for himself as to the risk. "In regard to the question of contributory negligence on the part of the deceased," said Lord Young, "the men who were working here were labourers, and the alleged contributory negligence comes to this, either that they ought to have enough intelligence to see for themselves when they came to a dangerous part of the operation and set a watch for themselves, or else that they should take care not to go on too long without seeing that the foreman did his duty. The usual case of contributory negligence is one of a man rushing into danger and risking his life against all the laws of ordinary prudence, but that is not the case here. I rather think that the deceased was entitled to assume that the foreman Miller had done his duty and sent up a man to watch. Miller was not in ignorance of the state of matters at this face, and I think it accords with the evidence that Miller's duty from the first was to have had some one on the top to watch for signs of danger. I do not think that the deceased was reckless of his own safety in that he went to work without seeing that there was a man on the top watching." It is indeed, in very different circumstances that the doctrine of contributory negligence finds a basis for reasonable application; and no doubt, as it was put in the same case, while employers are bound to take reasonable precautions for the safety of their men, they are not obliged to make provision for the safety of their workmen when they rush into dangers of their own making. *Cf. M'Evoy* v. *Waterford Steamship Co.*, 18 L. R. Ir. 159; *Martin* v. *Connah's Quay Alkali Co.*, 33 W. R. 216. Nor is the defence of contributory negligence done away with by the Employers' Liability Act; for, this statement no longer resting on a mere *semble* in *Stewart* v. *Evans* (49 L. T. N. S. 138), we have now Bowen, L.J., in *Thomas* v. *Quartermaine*, saying:

„ These two defences, that which rests on the doctrine *volenti non fit injuria* and that which is popularly described as contributory negligence, are quite different, and both, in my opinion, are open to an employer, if sued under the Employers' Liability Act of 1880."—*Irish Law Times.*

ESTOPPEL AND INTERPLEADER.

The case of *Richards* v. *Jenkins*, 56 Law J. Rep. Q. B. 293, reported in the June number of the *Law Journal* Reports, is likely to be of use in considering some of those questions of delicacy which often arise in interpleader issues. It concerns mainly the application of the doctrine of estoppel to questions of title to personalty arising in interpleader. The doctrine is one which of late years has made rapid progress, and no doubt has, especially in its application to the commercial transactions of life, added to the weapons of justice and facilitated business. In the hands of great and far-seeing judges no harm is done by its use, but there is, perhaps, some danger that in weaker hands it may degenerate into a means for undermining the positive and strict rules which are the foundation of the law of property. It is, therefore, as well that in the strict form of proceeding known to the law of personal property by way of interpleader the doctrine of estoppel should be considered as barred. The form of the issue "whether the property is the property of A as against B" is as narrow as it well can be, and probably the narrower it is the better.

The case arose out of the seizure by a County Court bailiff of certain machinery and plant which had been left by the claimant on a brickfield leased by him to the execution debtor. The lease was for twenty-five years from 1879. In 1884 the claimant had become bankrupt, but as the goods were in the possession of the execution debtor, and the bankrupt gave him no information in regard to them, the trustee did not make an attempt to take possession of them. The appearance of the bailiff, however, drew the bankrupt from his position of masterly inactivity: he became plaintiff in the interpleader issue, and the County Court judge decided in his favour on the authority of the case of *Carne* v. *Brice*, 18 Law J. Rep. Exch. 28. That was an interpleader issue between a married woman and the execution creditor of her husband, the goods seized being part of her separate estate. In that case the Court of Exchequer declined to allow the wife to give proof of the fact that the husband had become bankrupt, and that therefore the goods were not his. The County Court judge appeared to think that the decision governed this case, and that the effect of it generally was to prevent the *jus tertii* being set up in interpleader, but the effect of it in fact was only to prevent the *jus tertii* being set up in favour of the claimant, and it discountenanced the idea that the claimant could succeed merely by showing that the goods were not the execution debtor's. This view of the County Court judge led to a judgment in favour of the wrong person. The view taken by the Divisional Court (55 Law J. Rep. Q. B. 435) was in favour of the right side, but according to the Court of Appeal proceeded on the wrong ground. The Divisional Court held that the possession of the bailiff was the possession of the execution creditor, and therefore that the onus of proof lay on the claimant to show that the possession, which was *prima facie* evidence of title, was not in accordance with the true title. This the claimant was unable to do, because whatever was proved to be his he at the same time showed to be his trustee's. The Court of Appeal held that the theory of the possession of the bailiff or sheriff being the possession of the judgment creditor is unsound. The Master of the Rolls points out with much force that the moment of time at which the title is to be ascertained is the moment before the seizure, and that the possession after that is a possession for the law and not for either of the parties. On consideration this seems clear. The possession of goods by the sheriff can no more affect the rights of the parties to the goods than the possession by the Bank of England of money paid into court can affect the rights of parties to it. The point of time on which the rights of the parties centre is necessarily the seizure. But for the interpleader there would be an action of trespass, and in that action the question of right in the goods would have to be considered in reference to the moment of

seizure, and not subsequently. The Master of the Rolls proceeds to show that in this case the possession at the time of the seizure was in the execution debtor, and that the onus lay on the claimant to show that this possession was, in fact, his. He could not do so by reason of the bankruptcy, and the question then arose whether the execution creditor was not estopped from making use of the bankruptcy. On this point the Master of the Rolls assumes that as between the claimant and the execution debtor there was an estoppel, but points out that the estoppel created no interest in the goods, but simply prevented the execution debtor from saying the goods did not belong to the claimant and did not bind the judgment creditor. The reason given for this rule is that the execution creditor does not claim through or under the execution debtor, but claims through or under the law.

The correctness of this decision may be tested by supposing how the case would stand if no interpleader had been ordered. The claimant would then be plaintiff and the sheriff defendant in an action for trespass to goods. The sheriff would justify the seizure by showing that the goods were in the possession of the judgment debtor. Upon that the plaintiff would have to show that the possession of the execution debtor was his possession, and he would have to show it by evidence good against the sheriff. The Court of Appeal decide that the law of estoppel is strictly a law of evidence, and can only be set up against the person estopped and those claiming under him in the strict sense of the word, and that the sheriff is not one of these. The decision is important, as it gives the execution creditor goods under an execution which his debtor could not have given to him in payment of his debt by agreement; but in applying the law of estoppel the conflicts of justice must be considered, and at least the execution creditor is no worse off than if an action had been brought against the sheriff.—*The Law Journal.*

GUARDIANSHIP OF INFANTS.

One of the first cases, if not the first case demonstrating the utility of the Guardianship of infants Act, 1886 (49 & 50 Vict. c. 27),* recently came before Mr. Justice Kay. The Act has effected considerable alteration in the law, and has given to the court increased powers to deprive a father of the custody of an infant child, and to deliver the child to its mother. Under the previous law there was a limit of age up to which the mother could obtain the custody of her child. This age was at one time seven and afterwards sixteen years, but under the recent Act there is no such limit of age. Moreover, the consideration upon which the court is to act have been altered by the new statute, which provides (sect. 5) that three things are to be regarded, viz., the welfare of the infant, the conduct of the parents, and the wishes of the mother as well as of the father. In *Re S. Witten* (an infant) the application was mainly grounded on the alleged misconduct of the father. A man of 53 years of age, he was accused of having formed an improper connection with a young girl of six-and-twenty, who was under his tuition in medicine. The father wholly denied impropriety, said that he had adopted the lady in question, and that he never acted towards her in any other way than a father ought to act towards his daughter. It appeared, however, that the father had lost a position of trust in charge of a mission in consequence of being unable satisfactorily to meet this same charge of impropriety; that the wife had for the same reason commenced proceedings for a judicial separation, but had allowed them to be withdrawn on terms proposed by her husband in writing, which, however, he ultimately refused to carry out; and finally, that the young lady in question was still living with the father, having changed her surname to "Witten." Mrs. Witten, the mother of the infant. had heard that her husband intended in about two months to go to Morocco with their child and the young lady whose conduct was impunged, and to live there permanently. This being so, Mr. Justice Kay had no hesitation at all in acceding to the mother's application for the custody of the child, who is ten

* See 50 Vict. c. 21 (O.).

years old. His lordship hoped that the father's relations with Miss Dick were innocent, but said it was certainly rather difficult to believe it. But whether they were innocent or not, what was the conduct of a man who had completely destroyed the character of this girl by his association with her, as she herself had admitted on affidavit, and who had driven his wife by his conduct and association with this girl to take divorce proceedings against him, and was now putting pressure on his wife by taking from her this boy ten years old, the child of their marriage, and keeping him in his own house where he was living with Miss Dick? If the relations were as innocent as possible such conduct on the part of a married man was inexcusable — conduct which must give rise in the mind of any unprejudiced person to the gravest possible suspicion of his fidelity to his wife, and conduct which was in every way entirely indefensible. The boy must at once be delivered into the custody of his mother, and the father was bound to pay the cost of the application. Further, the judge declined to allow the boy to go to any house where Miss Dick was living, but said he might reside with his father for a fortnight in the summer and a week in the winter holdays, in any house in which that lady was not, and to which she did not come. If she attempted to asssociate with the boy in any shape or way his lordship would at once interfere. It may well be doubted whether such an application as this would have been successful, or so completely and easily successful, without the Legislation of 1886.—*Law Times.*

RECENT ENGLISH DECISIONS.

The *Law Reports* for September comprise 19 Q. B. D. pp. 277-356; 12 P. D. pp. 167-184; 35 Chy. D. pp. 611-736; and 12 App. Cas. pp. 283-470.

ADVERTISING HOARDINGS—AGREEMENT CREATING TENANCY—LIABILITY TO BE RATED.

Taylor v. *Pendleton*, 19 Q. B. D. 288, though not perhaps likely to be of much practical importance here, is deserving of a brief notice. The question was one arising on an assessment for poor rates. The parties assessed were advertising agents who had contracted with the owner of land for the privilege of erecting an advertising hoarding for a yearly rent with the privilege of removing a wall, the agreement to remain in force three years and be afterwards terminable by twelve months' notice, but if the owner should be obliged to give less than twelve months' notice he was to refund £20. By another agreement the owner agreed to let, and the advertising agents agreed to take another advertising station at a yearly rent for seven years, and the agent agreed to pay rates and taxes. The question for the court was whether these agreements amounted to a tenancy, or a mere license. The court (Wills and Grantham, JJ.) were unanimously of opinion that a tenancy was created in the land actually occupied by the hoardings, and that the lessees were, in respect of their tenancy, liable to be rated.

PRACTICE — COMPULSORY REFERENCE — OFFICIAL REFEREE—C. L. P. ACT, 1854, s. 3—(R. S. O. c. 50, s. 189)—DISCRETION.

The point decided in *Knight* v. *Coales*, 19 Q. B. D. 296, is that under sec. 3 of the C. L. P. Act, 1854 (R. S. O. c. 50, s. 189), the court or a judge has jurisdiction to refer compulsorily the whole matter in dispute in an action, if any part of the matter in dispute consists of matters of mere account which cannot conveniently be tried in the ordinary way; and that under the Judicature Act the reference may be directed to an official referee. Such a reference having under such circumstances been directed by Huddleston, B., and his order being affirmed by a Divisional Court, the Court of Appeal, though not prepared to say that they would have made such an order, nevertheless refused to interfere.

MEDICAL PRACTITIONER — UNREGISTERED ASSISTANT. RIGHT OF REGISTERED PRACTITIONER TO RECOVER FOR SERVICES OF—MEDICAL ACT, 1858, 21 & 22 V. c. 90—(R. S. O. c. 142, s. 43).

Howarth v. *Brearley*, 19 Q. B. D. 303, is a decision under the Medical Act, 1858. A qualified medical practitioner, duly registered under the Act, established a branch practice under the management of his brother, who was not so qualified or registered, and held no apothecaries' certificate. The action was brought by the assignee of the registered practitioner to recover charges for medical

aid and advice rendered and medicines supplied to the defendant by the brother alone, without consulting the registered practitioner. But it was held by Lord Coleridge, C.J., and Denman, J., that the plaintiff was not entitled to recover. Denman, L.J., says at p. 307:

> Looking at the Act, I think that a registered practitioner cannot give a roving authority to an unqualified person to practise in his name without consulting him or taking his advice, and then sue for the services rendered by the unqualified person. It would be entirely contrary to the purpose and intention of the Act.

ECCLESIASTICAL LAW—CONTEMPT.

Those who take any interest in the ecclesiastical litigation of the old country will find the case of *Ex parte Cox*, 19 Q. B. D. 307, worth reading. This was an application for a *habeas corpus* made by a clergyman imprisoned for disobedience to the order of the official principal. The applicant had been found guilty of ritualistic offences under the Church Discipline Act, and an order had been made for his suspension *ab officio* for a period of six months. During this period he officiated in breach of the order. Afterwards, and after the expiration of the six months, he was imprisoned under a writ *de contumace capiendo*. The court, Lord Coleridge, C.J., and A. L. Smith, J., held that the imprisonment was illegal, as the period of suspension under the order had expired; the order of suspension was no longer in force, and as the statute 53 Geo. III. c. 127, s. 1, authorized the issue of the writ *de contumace*, not by way of penalty for disobedience, but merely for enforcing the execution of the sentence pronounced by the court, as was determined by the previous authorities, it was held that it was too late after the period of suspension had expired to issue the writ. The prisoner was therefore discharged. The attempt to regulate such matters as the dress and posture of ministers of religion by process of law, enforced by imprisonment, seems a little out of date on this side of the Atlantic.

CONTRACT—SURETYSHIP AND GUARANTEE—PROMISSORY NOTE—CONSIDERATION.

Crears v. *Hunter*, 19 Q. B. D. 341, was an action on a promissory note in which one of the joint makers set up want of consideration. The note was given under the following circumstances:—The defendant's father had, before the defendant came of age, borrowed a sum of £200 from the plaintiff, promising that when his son came of age he would become surety for the debt. In 1877, after the defendant came of age, the plaintiff procured the defendant and his father to sign the promissory note sued on, whereby they jointly and severally promised to pay to the plaintiff or order "the sum of £200, being money lent, with interest on the same from Martinmas last past half yearly at the rate of five per cent. per annum." There was no evidence as to anything being said by the parties in relation to the signing of the note. Interest had been paid on the note, sometimes in the defendant's presence. It will be noticed that the note in terms did not provide for any extension of time for payment of the debt, and it was contended by the defendant that the mere expectation of forbearance, even though realized, was not sufficient consideration. But the Court of Appeal (Lord Esher, M.R., and Lopes and Lindley, L.L.J.) overruled the Divisional Court and affirmed the judgment of A. L. Smith, J., that if, as was found to be the fact by the jury, the note was signed by the defendant in order that the plaintiff might give time to his father, and the plaintiff did give time, that was a good consideration. Lord Esher, M.R., says at p. 345:

> It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to enable the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible.

ESTOPPEL—STATEMENT BY DEBTOR OF HIS AFFAIRS—BANKRUPTCY.

Roe v. *The Mutual Loan Fund*, 19 Q. B. D. 347, is a case illustrative of the law of estoppel. The plaintiff gave a bill of sale on his furniture to the defendants to secure an advance. Before the payment of the first instalment due under the bill of sale the plaintiff filed a petition in bankruptcy, and in his statement of affairs returned the defendants as secured creditors. The defendants sold the furniture under their bill of sale, and the proceeds being insufficient to pay their debts, they

proved for the residue. A composition of 2s. 6d. in the pound was, on the report of the official receiver sanctioned by the court, and paid to the creditors, including the defendants, but without prejudice to any claim the plaintiff might have in regard to the seizure and sale of the furniture. The plaintiff subsequently brought an action for the wrongful seizure of the goods, alleging that the bill of sale was invalid. Pollock, B., on a hearing on further consideration gave judgment in favour of the plaintiff; but the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, LL.J.) reversed his decision, holding that the plaintiff having in the bankruptcy proceedings treated the bill of sale as valid, and obtained thereby an advantage to himself, could not afterwards allege that the bill of sale was invalid. With regard to the payment of the composition "without prejudice," Lopes, L.J., says:—"The letter of the solicitors was relied on, but it cannot assist the plaintiff because the words 'without prejudice' are not consistent with the plaintiff's conduct."

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—PROFESSIONAL PRIVILEGE—LETTERS TO SOLICITOR—EXAMINATION FOR DISCOVERY.

Passing now to the cases in the Probate Division, *Re Halloway*, *Young* v. *Halloway*, 12 P. D. 167, is the first that claims our attention. The plaintiff sued to recall a probate on the ground that the testator was not of sound mind, and that the will was obtained by undue influence of the defendants, two of whom were the executors, and the third universal legatee. After the commencement of the action four anonymous letters relating to the matter in dispute were received—two by the plaintiff, one by her solicitor, and another by her counsel in the action. Butt, J., on the application of the defendants, ordered all the letters to be produced, but the Court of Appeal (Cotton, Lindley and Bowen, LL.J.) varied this order by confining it to the letters sent to the plaintiff, and exempting from production those sent to her legal advisers. These, the Court of Appeal held, stood on the same footing as information obtained by the legal advisers by their personal exertions for the purpose of the suit. Another point in the case was as to the right of the plaintiff to ask the following questions for the purposes of discovery. 3. "What sums of money have you and each of you received from the deceased (1) by way of payment for services rendered; (2) by way of loan; (3) by way of gift; and also whether the universal legatee had since the death of the testator made over any and what part of the property to the other defendants?" These questions the defendants declined to answer as being irrelevant. But the Court of Appeal affirmed the order of Butt, J., directing the questions to be answered, limiting interrogatory three to a period of three years.

LEGITIMACY—PATERNITY OF CHILD BORN IN WEDLOCK—PRESUMPTION OF LEGITIMACY.

The only other case in the Probate Division is *Bosvile* v. *The Attorney-General*, 12 P. D. 177, in which the important question is discussed whether the presumption that a child born in wedlock is legitimate may be rebutted, and if so under what circumstances, and by what evidence. The suit was one for a declaration of legitimacy. The plaintiff had been born 276 days after the last opportunity of intercourse between the husband and wife. Immediately after this last opportunity, the wife had eloped with a paramour, with whom she subsequently lived in adultery, and there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour. The judge at the trial directed the jury that it was for them to say whether on the whole evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child; and he read to them the opinion of Lord Lyndhurst in *Morris* v. *Davies*, 5 Cl. & F. 163. The jury found the child was illegitimate; and the Divisional Court (Lord Coleridge, C.J., and Butt, J.) held that the direction was right, and, that the verdict was not against evidence.

PRACTICE—CONCURRENT ACTIONS—ACTION IN COLONY, AND ENGLAND—COUNTERCLAIM.

Turning now to the cases in the Chancery Division, *Mutrie* v. *Binney*, 35 Chy. D. 614, is the first that demands attention. The facts of the case were a little peculiar. B., of London, and M. and C., of Honduras, carried on business in partnership at Honduras, under the style of Guild & Co. B. and N. carried on business in partnership in London also

under the name of Guild & Co. The Honduras firm employed the London firm as their agents, under an agreement that B.'s share in the Honduras firm should be placed to the credit of the London firm of Guild & Co. The Honduras partnership was dissolved, and a decree granted in Honduras for taking the partnership accounts. Before those accounts were fully taken, M. and C. brought this action in England against the London firm for an account of the dealings between the two firms, alleging the defendants to have made improper profits in their agency. The defendants denied having made improper profits, and by counterclaim claimed to have the accounts of the Honduras firm taken. This counterclaim North, J. struck out; but the Court of Appeal (Cotton, Lindley and Lopes, LL.J.) were of opinion, that though if M. and C. had not brought their action the defendants would not, after obtaining a decree in Honduras, have been allowed to carry on another action in England for the same purpose, still as the two actions were so closely connected that neither could be finally wound up independently of the other, the defendant ought to be allowed to prosecute his counterclaim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action; and on N.'s undertaking to be bound by the proceedings in the Honduras action the order of North, J. was discharged.

COMPANY—WINDING UP—DISTRESS FOR RENT ACCRUED AFTER WINDING-UP ORDER — MORTGAGE WITH ATTORNMENT CLAUSE — COMPANIES ACT, 1862, ss. 87, 163 (R. S. C. c. 129, ss. 16, 17).

In re Lancashire Cotton Spinning Co., Ex parte Carnelly, 35 Chy. D. 657, was an application under the Winding-up Act by mortgagees having an attornment clause, for leave to distrain for rent, accrued after the winding-up order, under the following circumstances: The company in liquidation had mortgaged their property to the mortgagees, the mortgage containing a clause whereby the mortgagors attorned tenants to the mortgagees at an annual rent of £1,595. The company having been ordered to be wound up, the official liquidator remained in possession of the mortgaged property for more than a year in order, if possible, to sell the business of the company as a going concern. He paid the expenses of keeping the property in repair, but did not actually work the mills thereon. The mortgagees acquiesced in this arrangement as best for all parties. The motion was for leave to distrain for the rent thus accrued since the winding-up order. But the Court of Appeal affirmed the decision of North, J., refusing leave, on the ground that it appeared that the occupation of the liquidator was for the benefit of the mortgagees as well as the company: and it would appear that in the opinion of the court, a mortgagee with an attornment clause seeking to distrain for his interest after a winding-up order is in a less favourable position than a landlord seeking to distrain for rent; and that in order to obtain such leave, it is in any case needful to establish that the rent has accrued under such circumstances, that it ought to be paid as part of the winding up proceedings. The Court of Appeal at the same time express grave doubts as to the correctness of the construction of sec. 87 (R. S. C. c. 129, s. 16) as determined *In re Exhall Coal Mining Co.*, 4 D. J. & S. 377, and doubted whether the court had in any case power to authorize a distress after a winding-up order had been made.

RAILWAY COMPANY—SUBSCRIBING COMPANY'S FUNDS TO PUBLIC OBJECTS—ULTRA VIRES—INJUNCTION.

In *Tomkinson* v. *South Eastern Ry. Co.*, 35 Chy. D. 675, a motion was successfully made by a stockholder of the defendant company to restrain the company and its officers from paying out of the moneys of the company a sum of £1,000, which, at a meeting of the stockholders, the directors were by resolution authorized to subscribe towards the erection of the Imperial Institute. It was sought to justify the payment on the ground that the establishment of the Institute might benefit the company by causing an increase of passenger traffic over their line. But Kay, J. pronounced the proposed expenditure *ultra vires*, and granted the injunction.

PAROL AGREEMENT—PART PERFORMANCE—EASEMENT—INJUNCTION—STATUTE OF FRAUDS.

In *McManus* v. *Cooke*, 35 Chy. D. 681, the applicability of the equity doctrine of part-performance to other contracts than those for the purchase and sale of land, of which specific performance may be decreed, is elaborately discussed by Kay, J. The plaintiff and the

defendant were owners of adjoining houses, and being about to rebuild, entered into a verbal agreement that the plaintiff should pull down a party wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight, with the lower end resting on the party wall. The plaintiff rebuilt the party wall, and erected a lean-to skylight on his side of it, as agreed; the defendant also erected a skylight on his side, but instead of a lean-to, so shaped it, as to obstruct the access of light to the plaintiff's premises more than the lean-to would have done. The action was brought to restrain the defendant from permitting his skylight to remain in its present position, or from erecting any structure contrary to the alleged agreement. The plaintiff relied on his performance of the agreement, as entitling him to specific performance of the agreement by the defendant. Counsel for the defendant argued that the doctrine of part performance was confined to sales of interests in land, and that what was claimed by the plaintiff was a mere easement, which was not an interest in land; but Kay, J., after reviewing the authorities, at p. 697, deduces from them the following propositions:

(1) The doctrine of part performance of a parol agreement which enables proof of it to be given, notwithstanding the Statute of Frauds, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. (2) Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance, if the alleged contract had been in writing. (3) The most obvious case of part performance is when the defendant is in possession of land of the plaintiff under the parol agreement. (4) The reason for the rule is that where the defendant has stood by, and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. (5) But this reason applies whenever the defendant has obtained, and is in possession of, some substantial advantage under a parol agreement, which, if in writing, would be such as the court would direct to be specifically performed. (6) The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.

Applying these principles to the case before him he granted the injunction as prayed.

TRADE MARK—INFRINGEMENT OF TRADE MARK—ACTIO PERSONALIS MORITUR CUM PERSONA.

The simple point determined by Chitty, J., in *Oakey* v. *Dalton*, 35 Chy. D. 700, was, that an action to restrain the infringement of a registered trade mark with the usual claim for an account of profits and damages is not within the rule *actio personalis moritur cum persona*, but being brought in respect of an injury to the property of the owner of the mark, may be continued by his executors after his death.

DISCOVERY—PRODUCTION OF DOCUMENTS—FRAUD—TRUSTEE.

In re Postlethwaite, Postlethwaite v. *Rickman*, 35 Chy. D. 722, was an application to compel production for the purpose of discovery. The action was brought for an account of profits in respect of a purchase of trust property, the plaintiff alleging that the sale was secretly made for the benefit of R., one of the trustees, with the connivance of T., another trustee who was a solicitor. The representatives of R. claimed privilege from production for letters from T. to R., and for T.'s bill of costs, on the ground that the communications were made by T. acting as solicitor to R. in his private capacity. But North, J., ordered the documents to be produced because the communication passed between two trustees, and because the solicitor and his client were charged with fraud. The latter ground is one which appears to us to be open to abuse. There may be cases where a plaintiff, by stating his case honestly, according to the facts, would not be entitled to the production of documents in the defendant's possession, but by dishonestly stating a case of alleged fraud, he may, according to the cases, procure production of documents he would otherwise not be entitled to, and having secured the benefit of the production, he may amend his statement of claim and strike out the fictitious allegations of fraud. One would think some *prima facie* proof of the existence of the alleged fraud should be required to be given, before documents, otherwise privileged, should be ordered to be produced on that ground.

WILL—BEQUEST—FUTURE ILLEGITIMATE CHILDREN, BEQUEST TO.

In re Hastie's Trusts, 35 Chy. D. 728, Stirling, J., discusses the law relating to bequests in favour of illegitimate children. A testator who had been for some years illicitly cohabiting with one Martha Eliza Macdaniell, by whom he had four illegitimate children, made his will whereby he gave a trust fund "in trust for my four natural children by M. E. M., viz.

I. C., E. C. and J. H., and all every other children and child which may be born of the said M. E. M., previous to, and of which she may be pregnant, at the time of my death, share and share alike." Besides the four children mentioned in the will, there were three other children born of M. E. M., after the date of the will and before the testator's death. A contest having arisen as to the fund in question, between these two classes of children, it was held by Stirling, J., that the word "children" was *prima facie* confined to legitimate children, but where, as in this case, there were upon the face of the will indications that the testator intended to include illegitimate children, they will be included. With regard to the validity of the bequest in favour of after born illegitimate children,—though admitting that a bequest to the testator's future illegitimate children would have been void for uncertainty, because it would have involved inquiries as to his access or non-access, and the access or non-access of other persons to the mother, which the law forbids;—yet as the objects of this bequest were to be identified merely by their maternity, the objection of uncertainty did not arise; and adopting the reasoning of James, L.J., in *Occleston* v. *Fullalove*, 9 Chy. 147, he decided that such a bequest could not be void on grounds of public policy, because the will does not take effect until the testator's death.

CONTRACT TO MAKE GOODS EQUAL TO SAMPLE—SALE BY SAMPLE—CAVEAT EMPTOR—WARRANTY OF MERCHANTABLENESS, IMPLIED—LATENT DEFECT.

Proceeding now to the Appeal Cases, the first to be noted is *Drummond* v. *Van Ingen*, 12 App. Cas. 284. This was an appeal to the Lords from the Court of Appeal on a question of mercantile law. The respondents, who were cloth merchants, ordered of the appellants who were cloth makers, worsted coatings, which in quality and weight were to be equal to samples previously furnished by the appellants to the respondents. The respondents' object was, as the appellants knew, to sell the coatings to clothiers and tailors. The coatings supplied corresponded in every respect with the samples, but owing to a latent defect which existed in both, the goods were unmerchantable for purposes for which goods of the same general class had previously been used in the trade. This latent defect was not discoverable in the samples by due diligence upon such inspection as was ordinary and usual upon sales of cloths of that class. The appellants sued the respondents for the price, and having failed before the courts below, now appealed to the House of Lords; but their lordships held (affirming the Court of Appeal) that upon such a contract there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used. Lord Macnaghten concisely lays down the principle on which the case was decided at p. 295, thus: "that a manufacturer who agrees to supply goods to order, knowing the purpose for which they are required, thereby impliedly undertakes to supply goods fit for the purpose in view."

DISCOVERY—ACTION TO RECOVER LAND—PURCHASE FOR VALUE WITHOUT NOTICE.

In *Ind* v. *Emmerson*, 12 App. Cas. 300, the House of Lords affirmed the decision of the Court of Appeal, 33 Chy. D. 323, which was noted *ante* p. 28, as *Emmerson* v. *Ind*. Their lordships do not, however, adopt the reasoning of the Court of Appeal, but proceed rather on the ground that the defence of "purchaser for value without notice" was only formerly available in equity as a protection from discovery when the plaintiff was applying to the auxiliary jurisdiction of the Court of Chancery in aid of an action of law, and was not so available where the plaintiff was seeking relief in the Court of Chancery even in cases where the latter had concurrent jurisdiction with the courts of law, and that as there was now, since the Judicature Act, but one court, the reason on which the plea of purchaser for value was allowed as a bar to discovery no longer exists.

DIVORCE—BASTARDIZING CLAUSE.

In *Hewat's Divorce Bill*, 12 App. Cas, 312, a clause in a divorce bill tending to bastardize a child to which the wife had given birth during the marriage,—notwithstanding there was access at the natural period of conception of the child,—was ordered to be struck out, the child being unrepresented.

LECTURES OF COLLEGE PROFESSOR TO HIS CLASS—INJUNCTION—RESTRAINING PUBLICATION.

Caird v. *Sime*, 12 App. Cas. 326, was an appeal from a Scotch court. The plaintiff was a professor in a Scotch university, and had

delivered a course of lectures to his class; a student attending the class had taken shorthand notes of the lectures which the defendant published. The present action was brought to restrain the publication. Considerable difference of opinion appears to have prevailed among the Scotch judges, as to whether the delivery of the lectures was not such a publication of them as to deprive the plaintiff of any right of property therein. Six of them held that he had still a right of property in them, while five held that he had not, and two others, that even if he had, the defendant was not interfering with it. The House of Lords, however, determined that the delivering of the lectures was not equivalent to publication, and that the appellant was entitled to restrain the defendant from publishing them. From this decision, however, Lord Fitzgerald dissented, considering that the plaintiff occupied a public position, and that his lectures as soon as delivered became public property.

Bonus dividend—Capital or income—Tenant for life and remainderman.

Bouch v. *Sproule*, 12 App. Cas. 385, is the *finale* of a case noted *ante* vol. 21, p. 331, as *In re Bouch*, *Sproule* v. *Bouch*. The point in controversy arose between a tenant for life and remainderman as to whether certain bonus dividends and new shares purchased therewith, were to be regarded as income or accretions of capital. Kay, J. decided they were capital, and the Court of Appeal reversed his decision, and now the House of Lords have reversed the Court of Appeal and restored the judgment of Kay, J. The principle deducible from this case appears to be this, that where a company having no power to add to its capital declares a dividend out of surplus profits, such dividend must be deemed income; but where the company has power to increase its capital, and a bonus dividend is declared as a part of a scheme for effecting such increase, then the bonus must be regarded as capital.

Limited company—Company purchasing its own shares—Ultra vires.

In *Trevor* v. *Whitworth*, 12 App. Cas. 409, the House of Lords also reversed a decision of the Court of Appeal. A limited company incorporated under the Joint Stock Companies Acts with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business, and any other businesses and transactions which the company might consider in any way conducive or auxiliary thereto, or in any way connected therewith. The articles authorized the company to purchase its own shares. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the price of his shares sold by him to the company before the liquidation and, not wholly paid for. But the House of Lords (reversing the Court of Appeal, and disapproving of the reasoning of that court *In re Dronfield Silkstone Coal Co.*, 17 Chy. D. 76) held that such a company had no power under the Companies Acts to purchase its own shares, that the purchase was *ultra vires* and the claim must fail.

Queensland Constitution Act, 1867, ss. 22, 24—Seat in council vacated (B. N. A. Act, s. 31, ss. 1.)

Attorney-General v. *Gibbon*, 12 App. Cas. 442, is an adjudication by the Privy Council upon the construction of the Queensland Constitution Act of 1867, which provides that if any legislative councillor shall for two sucessive sessions fail to give his attendance, without permission, his seat shall thereby became vacant. The respondent, who was a councillor, absented himself during the whole of three sessions, having previously obtained permission for a year, which period of time, in the event, covered the whole of the first and part of the second session. Their lordships held that the seat was vacated, and that the permission did not cover two successive sessions.

Trade mark—Right to exclusive user—Infringement.

In *Somerville* v. *Schembri*, 12 App. Cas. 453, the Judicial Committee of the Privy Council on an appeal from the Court of Appeal of Malta, held that by the general principles of commercial law, as soon as a trade mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of that firm, and its infringement by others may be restrained. Thus in the case in hand, the appellant's firm were makers of cigarettes, which became favourably known under the trade mark "Kaisar-i-Hind," and it was held that the use of that trade mark by others for

soap, pickles, hats, etc., could not impede the acquisition of an exclusive right to it as a trade mark for cigarettes, and that the respondents should be restrained from using for cigarettes a copy of the mark with colourable variations, such copy being likely, even if not intended, to deceive purchasers into the belief that such cigarettes were manufactured by the appellants' firm.

PRACTICE — CRIMINAL PROCEEDINGS — CONVICTION SET ASIDE BY PRIVY COUNCIL—ORDER STRIKING OFF ROLLS REVERSED.

In re Dillet, 12 App. Cas. 459, is the concluding case in the appeal reports, and is somewhat remarkable as being an appeal to the Judicial Committee in a criminal case from the Supreme Court of Honduras, brought by special leave of the Privy Council—happily for British justice—on grounds that are not often assigned as reasons of appeal. The appellant was a solicitor, and, it appeared, had incurred the displeasure of the Chief Justice of Honduras, who directed him to be indicted for perjury, and on the trial of the case secured his conviction by directions to the jury, which were, as the Privy Council found, improper and grievously unjust to the appellant; and thereafter, as a consequence of his conviction, made an order striking him off the rolls. The appeal was brought both from the conviction and the consequent order striking him off the rolls, and both the conviction and the order were reversed.

REPORTS.

ONTARIO:

DIVISION COURT.

GEORGE F. THOMPSON v. THE OTTAWA TEMPERANCE COFFEE HOUSE COMPANY (LIMITED).

Creditor—Deed of composition — Dividend sheet — Liability.

The plaintiff, Thompson, a coal merchant, sued the company for $95, the value of coal supplied. The defendants acknowledged the debt, but pleaded that the plaintiff had bound himself to take payment therefor in small monthly instalments.

It was proved at the hearing, that in March, 1887, the coffee house company, finding that they owed about $2,000, authorized their president to make the best terms possible with the creditors. As a result, creditors to the amount of nearly $1,800, signed an agreement in the nature of a deed of composition. By the terms of this deed the creditors promised not to sue or molest the company, provided, and so long as a monthly dividend was regularly paid them. A dividend sheet was prepared by the treasurer in accordance with the terms of the agreement. The plaintiff creditor, Thompson, refused to sign the agreement of composition; but signed three monthly dividend sheets and received the dividends in cash. The plaintiff then brought suit to recover the debt less the amount of cash received from the treasurer of the company as dividend.

Dr. R. J. Wicksteed, for the company, contended that although the plaintiff had in words refused to sign the composition agreement, he had, in fact and in deed, adopted it by signing the dividend sheets. The composition deed, and its schedules—the dividend sheets—could not be separated; although there was no direct reference in either to the other. The dividend sheet was an accessory to the agreement. *Accessorium sequitur naturam rei cui accedit.* (Abbott's Law Dictionary, Verbo *Accessory*). The plaintiff knew of the signing of the agreement by a large majority in value of the creditors. He deliberately signed the dividend sheets prepared in accordance with its terms. There was no other agreement between the company and its creditors. All this the plaintiff had admitted. Signing the dividend sheet—an inseparable accessory to the deed of composition—was a more important and binding act than was the signing of the deed.

Following the dicta of Judges Ashurst and Buller in *Heathcote* v. *Crookshanks* (2 East), this agreement of composition between the company and its creditors is not binding in law without the acceptance of the less sum stipulated for. The creditors are always entitled to their whole demand until the agreement has been followed up by actual acceptance. The agreement was a *nudum pactum* unless they afterwards accepted the certain proportion. *E converso*, the creditor accepting the proportion—accepting the advantage of the dividend, should bear the burden or restraint imposed by the agreement. *Cui sentit commodum debet sentire et onus.*

Held, by W. A. Ross, J., that a connection be-

tween the dividend sheet and the deed of composition had not been sufficiently established. The plaintiff, signing the dividend sheet, did so only as a means of getting a portion of what was due him. Judgment for plaintiff.

J. P. Fisher, for the plaintiff.

R. J. Wicksteed, for defendants.

NOTES OF CANADIAN CASES.

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CHANCERY DIVISION.

Proudfoot, J.] [Sep. 5.

WELLS v. NORTHERN RAILWAY CO.

Railways—User—Subway—Consolidated Railway Act, 1879, *s.* 27.

The plaintiff was the owner of certain lands, a right of way over which had in 1854 been sold by J. G., the then owner, to the defendants' railway. The defendants built their railroad along this right of way in 1858, and where the road crosses a depression in the ground a trestle bridge was built and a subway left under. From 1862 to the few months before this action was brought, the plaintiff and those under whom he claimed enjoyed the undisputed use of this subway. The defendants were now filling it in, in order to make a solid track across the depression, and refused to give any compensation for it to the plaintiffs, and the plaintiff asked for damages for the obstruction of the subway, and to have it reopened. The defendants pleaded not guilty, and referred to the Consolidated Railway Act, 1879, sec. 27.

Held, that the evidence in this case showed such an enjoyment as of right of the subway, and such an open and continuous user thereof, that the plaintiff was entitled to assume that there was a reservation of it in the deed of conveyance from J. G. to the railway, or was entitled to claim the easement under the Prescription Act. He could not prevent the filling up of the trestle work but was entitled to damages for his property in the easement, which damages should, if the parties could not agree, be ascertained under the Railway Act.

Ritchie, Q C., and *R. Boultbee*, for the plaintiff.

S. H. Blake, Q.C., for the defendants.

Boyd, C.] [Sep. 13.

RE HALL.

Advancement—Intestacy—Hotchpot—R. S. O. ch. 105, *s.* 41, 43.

J. H. died intestate, and among his assets were found a promissory note for $500, made by his son in his favour. This son of J. H. predeceased him and died intestate, leaving a child who claimed to share under the Statute of Distributions in the estate of J. H. with the children of J. H. The question was whether he was bound to bring the $500 into hotchpot so as to equalize the shares coming to him and the children of J. H.

Held, that the writing required by R. S. O. ch. 105, secs. 41, 43, to evidence an advancement under those two sections may be either an expression by the intestate that the donation is by way of advancement, or an acknowledgment to the same effect by the child; but in this case the only writing was the note, and that imported that the original dealing was one of loan or debt between the parties, and as such did not satisfy the Statute, and the grandchild of J. H. was not required to bring the amount of that note into hotchpot.

The difference between the law of England and that of Ontario as to advancement commented upon.

J. R. Roaf, for the administrator of J. H.

J. Hoskin, Q. C., for the infants.

Divl. Ct.] [Sep. 10.

SADERQUIST v. THE ONTARIO BANK.

Deposit receipt—Fradulent receipt of the money—Lapse of time without depositor notifying bank (depositee)—Onus of notice—Estoppel.

The plaintiff—an ignorant man—deposited $650 with defendants on September 24, 1884, handed the deposit receipt which he got to S. S. for safe keeping, and went away to work on a railway. He returned in April, 1885, when S. S. told him he had drawn the money on the receipt and promised to pay him back.

Plaintiff, not knowing that he had any rights against the bank, did nothing further, and S. S. left the country in the August following, being heavily in debt. In the December following plaintiff was advised that he had rights against the bank, and he consulted a solicitor who promised to attend to it but did nothing. In April, 1886, he consulted another solicitor, when a demand was made on the bank and refused, and action brought. The demand was the first intimation plaintiff gave the bank of what had been done. In an action against the bank for the amount, it was

Held (reversing ARMOUR, J.), that the delay was not suggestive of collusion or any unfair dealing on the part of the plaintiff. No legal duty was cast upon the plaintiff to advise the bank that it had been deceived in or after April, 1885. His failure to claim his money or sue the bank at that time did not operate against him so long as his claim was not barred by the Statute of Limitations.

There was no negligence on his part which caused or contributed to the fraud so as to raise an estoppel. As there was no duty cast upon the plaintiff to notify the bank, one of the essential elements of estoppel by conduct was absent. *The Merchants' Bank* v. *Lucas*, 13 O. R. 520, distinguished.

Ritchie, Q.C., for the plaintiff.

Falconbridge, Q.C., for the defendants.

REVIEWS.

FOURTH ANNUAL REPORT OF THE DIRECTORS OF THE CANADA LAND LAW AMENDMENT ASSOCIATION.

We have been favoured with a copy of the Fourth Annual Report of the Canada Land Law Amendment Association. The work accomplished by this Association furnishes a strong argument in favour of the value of organization as a means for carrying out reforms. The principal object of its formation was to secure the introduction into this Province of the Torrens system of registration of titles, and certain other amendments of the law of real estate, having for their end the facilitating that system of registration, and generally bringing the law of real estate more into harmony with the law of personalty.

Though the Association has not accomplished all that it set itself to do, it may nevertheless be congratulated upon having succeeded in making very considerable progress. It has induced the Government of this Province to pass the Devolution of Estates Act, which has to a great extent abolished the legal distinction between realty and personalty, and it has also procured the passage of Acts which, in a modified and limited manner, introduce the Torrens system of registration. Furthermore, through the agitation of this Association, the Torrens system has been introduced, together with the modification of the law of realty which they advocated, into the North-West Territories and the Province of Manitoba. Such an amount of solid work accomplished in so brief a space of time—for the Association has only been in existence a little over four years—speaks volumes for the energy with which the objects of the Association have been promoted. To have virtually revolutionized the law of real estate in so vast a tract of country in so short a space of time, is certainly something to boast of. At the same time it is perhaps premature to speak as to the results of the changes which have thus been brought about.

We understand that in Toronto and Manitoba the Torrens system of registration of title is found to work well and smoothly. Some little friction was to be expected at first, but we believe that practice and experience are daily rendering the system more easily understood, and no doubt its benefits will, as time rolls on, be made more and more apparent when the unimpeachability of the registered title comes to be generally known.

How far the Devolution of Estates Act successfully carries out the views of the Association we do not know; we are inclined to think it will require a good many judicial decisions before its precise effect will be made plain. Possibly some amendments will be found necessary. We are not by any means satisfied that the nature and effect of the changes in the law of real estate which this Act makes or purports to make, have been as thoroughly "thought out" as they ought to have been, but time will tell; and though tinkering the law on this or any subject is much to be deprecated, yet tinkered it will be, as often as occasion requires, by our annual law-repairing machine.

Some of the suggestions contained in the report are worthy of the best consideration of the Government, particularly the feasibility of reducing the expense of bringing land under the Land Titles Act; and the application of the surplus fees of the registry offices towards developing the new system of registration.

FLOTSAM AND JETSAM.

WHAT are "necessaries" for a legal "infant"? This is a question of perennial interest to tradespeople, and more particularly, it would seem, to tailors and outfitters. Well, it is no longer enough for a tradesman to consider whether the goods he supplies to young Hopeful are in their nature necessary or suitable to his social status; he must satisfy himself, and be able to satisfy the court, that they are actually necessary to his customer. In the recent case of *Johnstone* v. *Marks*, a tailor supplied £40 worth of outfit to a minor, who lived with his father, but he did not address to the father any inquiries on the subject. When he sued for the price, the judge refused to admit evidence to show that the infant was well supplied with clothes which his father had otherwise provided; but the Court of Appeal held that the ruling of the judge was wrong, and that the real question was, not whether goods supplied were "necessaries" in their nature or in the abstract, but whether they were actually, and as a practical question, necessary to the infant supplied. Here the father had fully supplied the needs of the infant, and therefore the supplies he foraged for himself were not "necessaries." Tradesmen, nquire.—London *Weekly Despatch*, August 7, 1887

Law Society of Upper Canada.

OSGOODE HALL..

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

Law Society of Upper Canada.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

Canada Law Journal.

VOL. XXIII. OCTOBER 15, 1887. No. 18.

DIARY FOR OCTOBER.

15. Sat.....C. C. York, term ends. English law introduced into Upper Canada, 1792.
16. Sun .....19*th Sunday after Trinity.*
21. Fri.....Battle of Trafalgar, 1805.
23. Sun .....20*th Sunday after Trinity.* Lord Lansdowne Governor-General. 1883.
25. Tues ...Primary Examinations for Students and Articled Clerks, University Grads. and Matics. seeking admission to Law Society to present papers. Sittings of Supreme Court Canada begin.
29. Sat.....Last day for filing papers for call or admission.
30. Sun.....21*st Sunday after Trinity.*

TORONTO, OCTOBER 15, 1887.

THE vacancy on the Ontario Bench still continues. The difficulty of finding men in the front rank of the profession willing to leave the Bar for the Bench is a growing one. It will be a great evil when the opinions of leading counsel command more confidence than those of judges to whom is of course given the right of decision; and that time is fast approaching—in fact, in the opinion of many, has to a certain extent already arrived.

THE Blackstone Publishing Company of Philadelphia are continuing to issue their excellent series of Text Books with promptitude, and in the same excellent style in which they commenced. The books already issued are "Smith on Master and Servant," "Challis on Real Estate," "DeCollyar on Guarantees," "Smith on Negligence," "Blackburn on Sales," "Pollock on Torts," "Taylor on Evidence," Vols. 1 & 2. As their advertisement announces, this series will constitute in itself a complete collection of the freshest, most authoritative and the most valuable text books in the leading departments of law. Even the jocular is not forgotten, as witness the last two lines of the index in Mr. Taylor's most readable as well as most learned book:

ZEAL, danger of relying on .....75, etc.
Proof of indomitable,. in illustrating this branch of the law.....*infra-passim*.

A WESTERN paper gets off rather a clever hit in reference to a mode of enforcing municipal regulations more common in the United States than in the Mother Country or in this Dominion. Thus:—

"Did you hear the sad news about Jinks?" asked Gus Snobberly of Charlie Knickerbocker. "No; what is it?" "He was drowned while rowlng a boat in Central Park." "Couldn't he swim?" "That wouldn't have made any difference. Swimming in Central Park is strictly prohibited, and the park police enforce the law, you know. If he had tried to swim he would have been clubbed to death."

A natural concatenation of ideas takes one's thoughts to the state of things at present existing in Ireland. If the blatant nonsense preached by Irish demagogues as to non-payment of rent and their rascally incitements to murder and license were indulged in America, we venture to say that the authorities would soon initiate a "clubbing" process that would, in a very short time, knock some knowledge of *meum et tuum* into the heads of the malcontents. The views of the American citizen (not however expressed when a presidential election is on hand) are very similar to those attributed to Oliver Cromwell on the Irish question. The people—a generous and intelligent race—are good enough if left to themselves; but unhappily for themselves and their neighbours they are not. A stout rope and a "sour apple tree" for those who are leaders in the ruin of their country and for some of their English sympathizers would be the western, and possibly an effective mode of abating the nuisance.

BENCH AND BAR.

It is not undesirable to call attention from time to time to the legal axiom that members of the profession are in a sense officers of the courts in which they plead or practise. In no better way can the dignity of the courts or the proper administration of justice be upheld than by barristers and solicitors putting this theory into practice. Our namesake in England thus refers to some incidents related to this subject:—

"The reputation of the bar in England, Ireland and Scotland is affected by its degradation in any one of the sister countries, in each of which a similar organization and the same principles of professional conduct prevail. The legal profession in England cannot be indifferent to such spectacles as that presented in the coroner's court at Mitchelstown. A barrister in such a court is more than ordinarily on his honour in point of forbearance and candour because the court has imperfect powers of controlling him and the judge has frequently no great forensic experience; but we find at Mitchelstown the words 'scoundrel, villain, ruffian, and murderer,' addressed to a witness. The processes of intimidation perfected outside are brought into courts of law, and the barrister, an officer of justice, is made the instrument of frightening or attempting to frighten witnesses from speaking the truth, which it is his duty to ensure that they shall speak. The English bar is not altogether blameless in this matter. Topics are sometimes introduced in cross-examination, the only object of which is to give pain and obstruct justice; but the profession on this side of the Channel cannot but view with concern the prospect of the wig and gown in another part of the United Kingdom being used to cover the purposes of a political organization, of whatever colour it may be."

JUSTICES OF THE PEACE AND POLICE MAGISTRATES.

A case of some interest to the public, and to those concerned in the administration of justice, has recently been decided by the Judge of the County Court of York.

It is provided by the Revised Statutes of Ontario, cap. 72, sec. 6, that no Justice of the Peace shall act in cities and towns where there is a Police Magistrate, except during the absence or illness of such Police Magistrate or without his written request. During the absence of the Police Magistrate of the city of Toronto a woman named Seymour was charged with keeping a house of ill-fame, and was tried before two Justices of the Peace for the city, convicted and sentenced to six months in the Mercer Reformatory. From this decision the prisoner appealed to the General Sessions of the Peace. The appeal was heard before His Honor Judge McDougall and a jury. The jury confirmed the conviction, but the learned judge reserved sentence to consider points of law which had been raised by the prisoner's counsel. At the close of the case for the prosecution, counsel for the prisoner asked that the conviction should be quashed without going to the jury, on the grounds

1st. That there was a Police Magistrate for the city of Toronto.

2nd. That it did not appear upon the information, conviction or evidence that the Police Magistrate of the city of Toronto was ill or absent, or that the convicting justices were acting on his written request.

3rd. That the conviction could not be amended by inserting the fact that the Police Magistrate was absent.

The learned judge held that the objections were well taken and discharged the prisoner, quashing the conviction, but not giving costs to the prisoner on account of

the verdict of the jury sustaining the finding of the magistrate on the facts.

It is to be deduced from this decision that where Justices act during the absence or illness of a Police Magistrate, or at his written request, the fact of such absence, illness or request should appear on the information and conviction.

LAW SOCIETY.

TRINITY TERM, 1887.

The following is a *résumé* of the proceedings of Convocation during Trinity Term, 1887:—

The following gentlemen were called to the Bar during Trinity Term, 1887, viz.:

September 5th.—John Healy Reeves, William Louis Scott, James Alfred Mills, Edward James Barrow Duncan, Alfred William Lane, George Somerville Wilgress, John Mercer McWhinney, James McGregor Young, Wesley Byron Lawson, Ernest Heaton, Frank Meade Field, Edward Augustus Wismer, John Alexander Davidson, James Morris Balderson, Henry Edward Ridley, Joseph Hetherington Bowes, John Ross Shaw, John McKay, Alexander Claude Forster Boulton.

September 10th.—Norman McDonald, Neil McCrimnion.

September 16th.—Thomas Cowper Robinette, John Dawson Montgomery, Theodore Augustus McGillivray.

The following gentlemen were granted Certificates of Fitness as solicitors, viz.:—

September 5th.—W. F. Johnston, J. H. Reeves, J. M. Balderson, A. W. Fraser, T. C. Robinette, J. H. Bowes, D. G. Marshall, W. L. Scott, J. D. Montgomery, J. M. Young, C. R. Boulton, T. A. McGillivray, N. McCrimnion, A. J. Arnold, J. A. Page, J. W. Bennett, C. H. Brydges, D. D. Grierson, F. F. Lemieux, H. O. E. Pratt, J. D. O'Neill, J. P. Eastwood, A. W. Lane, E. H. Ambrose.

September 6th.—J. R. Haney, G. W. Green, G. F. Henderson J. A. Mills, M. A. Everetts, J. McKay, H. E. Ridley, W. B. Lawson, J. H. Jacks.

September 10th.—N. McDonald, W. H. Hearst, J. E. Halliwell.

September 16th.—O. M. Jones, J. M. McWhinney.

The following gentleman passed the First Intermediate Examination, viz.:—

D. A. McKillop, with honors and first scholarship, R. M. Grahame, with honors and second scholarship, A. E. Lussier, with honors and third scholarship, A. Weir with honors; and Messrs. H. Armstrong, S. H. Brooke, H. W. Lawlor, W. H. Irving, P. H. Bartlett, G. A. Jordan, G. Ross, J. P. Dunlop, B. N. Davis, J. F. Keith, J. H. Cooper, J. Greenizen, G. E. K. Cross, W. J. Hanna, E. N. R. Burns, A. C. Patterson, F. M. Young, S. B. Arnold, W. G. Green, C. Murphy, A. W. Macdougauld, G. C. Hart, A. Henderson, J. Knowles, G. J. Smith, H. P. Thomas, J. W. Blair, T. W. R. McRae, E. G. P. Pickup, A. Purdom, J. W. Roswell.

The following gentlemen passed the Second Intermediate Examination, viz.:—

S. A. Henderson, with honors and first scholarship, C. Kemp, with honors and second scholarship, W. H. Williams, with honors and third scholarship, H. H. Johnston, F. Reid with honors; and Messrs. W. Mundell, A. B. Thompson, H. B. Witton, E. H. Johnston, J. B. Davidson, F. H. Sangster, S. W. Perry, A. E. K. Greer, I. B. McColl, A. L. Baird, W. F. Bannerman, A. W. Burk, C. D. MacCaulay, H. Holman, W. A. Chisholm, F. B. Fetherstonhaugh, A. F. Lobb, M. F. Muir, T. Graham, J. S. Walker.

The following candidates were admitted as Students-at-Law, viz.:—

Graduates.

A. G. Mackay, T. G. A. Wright, W. A. Cameron, A. Abbott, H. A. Aikins, A. J. Armstrong, E. Bayley, H. Carpenter, J. A. Ferguson, C. Fraser, J. J. Hughes, A. J. Keeler, W. H. Nesbitt, E. B. Ryckman, A. G. Smith, H. E. Stone, J. A. Taylor, R. B. Matheson, C. W. Williams.

Matriculants.

D. Ferguson, W. E. Gundy, A. T. Hunter, W. J. Harvey, L. G. McCarthy, M. H. McLaughlin, J. Kerr.

Juniors.

T. C. Thomson, J. O. Dromgole, B. S.

Lefroy, C. S. Leitch, A. B. Fry, A. Bicknell, J. B. Quinton, P. Sherwood, J. Isbister, W. J. Elliott, G. G. Duncan, N. Jeffrey, F. T. Costello, G. M. Vance, G. S. Macdonald, H. E. C. Stoney, G. A. Sayer, A. S. Macdonell, J. B. Ferguson, G. E. Watterworth, W. H. Grant, W. D. Card, F. G. Evans, H. F. MacLeod.

MONDAY, 5TH SEPTEMBER.

Convocation met.

Present—Messrs S. H. Blake, Falconbridge, Ferguson, Foy, Hoskin, Irving, Lash, Mackelcan, Maclennan, Morris, Moss, Osler.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Mr. Moss, from the Committee on Legal Education, presented a report on the case of Mr. W. E. Kelly, which was adopted.

A letter was read from Miss Ann Dolan, of Ohio, complaining of the conduct of a barrister and solicitor.

The letter was referred to the Committee on Discipline to report whether there was a *prima facie* case.

Ordered, That the Secretary be instructed to telegraph to Lord Herschell as follows:—

"The Benchers of the Law Society, on behalf of the Bar of Ontario, request the pleasure of Lord Herschell's company at dinner at Toronto on such day as he may name."

And that Messrs. Falconbridge, Irving, Kerr, Lash, McCarthy, Mackelcan, Maclennan and Murray be a committee to confer with the members of the Bar on the subject and to make all necessary arrangements—the committee to have power to add to their number.

The Secretary reported a verbal message from Mr. Tully, the Government architect, in reference to painting the east wing. Referred to the Finance Committee with power to act.

TUESDAY, 6TH SEPTEMBER.

Convocation met.

Present—Messrs. Beaty, Bruce, Falconbridge, Ferguson, Hoskin, Irving, Lash, Maclennan, Martin, Moss.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Mr. Hoskin, from the Committee on Discipline, reported in the matter of the complaint of Mr. Reynolds, that a *prima facie* case had not been shown.

The report was received, considered and adopted.

Mr. Moss, from the Committee on Legal Education, reported in the matter of J. R. Haney, recommending that the Certificate of Fitness, which had been signed in 1881 by the Treasurer, should be delivered to Mr. Haney.

The report was adopted, and it was ordered accordingly.

The petition of S. A. Henderson, J. Kyles, T. Walmsley and H. E. Irwin, respecting their admission to the Law Society as B. A.'s of Toronto University, was read and referred to the Legal Education Committee for report.

Mr. Lash, from the Select Committee on Honors and Scholarships, presented their report which was read, and is as follows:—

The committee, to whom was referred the question of honors and scholarships in connection with the First and Second Intermediate Examinations, beg leave to report as follows:—

1. The committee find that Messrs. D. A. McKillop, R. M. Grahame and A. E. Lussier passed the First Intermediate Examination with honors, and that Mr. McKillop is entitled to a scholarship of one hundred dollars; that Mr. Grahame is entitled to a scholarship of sixty dollars, and that Mr. Lussier is entitled to a scholarship of forty dollars.

The committee further find that Messrs S. A. Henderson, C Kemp, W. H. Williams, H. H. Johnston, and F. Reid passed the Second Intermediate Examination with honors, and that Mr. Henderson is entitled to a scholarship of one hundred dollars, Mr. Kemp to a scholarship of sixty dollars, and Mr. Williams to a scholarship of forty dollars.

That Mr. Mundell obtained the necessary number of marks in the Second Intermediate Examination to entitle him to pass with honors and to be awarded the first scholarship had he been in due course, but owing to the length of time since he entered the Society (viz., Michaelmas Term, 1876), he is not under the rules entitled to be passed with honors, or to be awarded the scholarship.

That Mr. A. Weir obtained in the aggregate of marks for pass and honor examination in the First Intermediate more than three-fourths, but he failed by two marks in obtaining the necessary one-half of the aggregate of the marks in one subject. And under the rule Mr. Weir is not entitled to be passed with honors or to receive the third scholarship to which he would have otherwise been entitled. The committee, however, recommend that he be passed with honors, and receive a diploma in that behalf.

The report was received and adopted, and it was ordered accordingly.

Ordered, That under the circumstances mentioned in the report of the Select Committee, Mr. A. Weir be passed with honors in the First Intermediate Examination, and that he receive the proper diploma in that behalf.

SATURDAY, 10TH SEPTEMBER.

Convocation met.

Present — Messrs. Cameron, Falconbridge, Irving, Mackelcan, Maclennan, McCarthy, McMichael, Morris, Moss, Murray.

In the absence of the Treasurer Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The Secretary reported that N. McDonald had completed his papers, and was entitled to be called to the Bar and receive a Certificate of Fitness.

The report was adopted, and ordered accordingly.

The Secretary reported that W. H. Hearst and J. E. Halliwell had completed their papers, and were entitled to Certificates of Fitness.

Ordered, That they receive certificates.

FRIDAY, 16TH SEPTEMBER.

[Subject to confirmation at next meeting of Convocation.]

Convocation met.

Present—The Treasurer and Messrs. Foy, Guthrie, Hardy, Hoskin, Irving, Kerr, Mackelcan, Maclennan, McMichael, Morris, Moss, Murray, Robinson.

The minutes of last meeting were read and approved.

Mr. Moss, from the Committee on Legal Education, reported on the case of O. M. Jones, dealt with by Convocation on the 18th November, 1884, that he had complied with the order, that his papers are regular, and having passed the examination he is entitled to his Certificate of Fitness.

The report was adopted, and it was ordered accordingly.

Mr. Moss, from the same committee, reported on the petition of Messrs. Henderson, Kyles, Walmsley and Irwin, recommending that the prayer be not granted.

The report was ordered for immediate consideration and adopted.

Mr. Maclennan, from the Committee on Reporting, presented their report as follows:—

Your committee have great pleasure in reporting that Mr. Grant's work is in a more satisfactory state than for a long time past. There are now only nineteen un-reported cases of which none are of an older date than May last. All the cases are in print and in the hands of the editor, and seven have been revised.

The work in the other divisions is well up, and it may be said there are no arrears.

There are also no arrears in the Practice Reports.

The Triennial Digest is expected to be in the hands of the profession in about ten days. It will include Volume XII., Ontario Reports, Volume XIII., Appeal Reports, and Volume XI., Practice Reports.

The report was ordered for immediate consideration and adopted.

The petition of W. Mundell was read and received.

Ordered, That it be referred to the Committee on Legal Education to report next Term.

The letter of Lord Herschell was read in reply to the invitation to dinner telegraphed to him on the 5th instant.

The letter of Mr. Justice Patterson on the subject of the rules was read, and ordered to be acknowledged.

The letter of the Secretary was read, and it was ordered that he have a fortnight's leave of absence.

Mr. Kerr reported that the visitors had approved of the new rules in so far as any of them is or are subject to approval or disapproval by the visitors, and laid before Convocation the certificate of approval which is as follows:—

"Approved, so far as any of the foregoing rules is or are subject to approval or disapproval by the visitors.

(Sgd.) "John H. Hagarty, C.J.O.
" "J. A. Boyd, C.
" "Thomas Galt, J.
" "John O'Connor, J.
" "Thomas Ferguson, J.
" "F. Osler, J.A.
" "John E. Rose, J."

Ordered, That the certificate be preserved of record.

Mr. Kerr moved that the rules as ap-

proved by the visitors be read the first time. Carried unanimously.

Mr. Kerr moved that the new rules be read a second and third time and passed. Carried unanimously.

Mr. Kerr reported that pursuant to instructions he had caused an index to be prepared, and the question of remuneration was ordered to be referred to the Finance Committee.

Ordered, That an edition of 1,000 copies with the index be printed.

Convocation adjourned.

SELECTIONS.

THE LAW OF RESISTANCE TO THE POLICE.

On September 14, in the House of Lords, in the conversation on the murder of Head-Constable Whelehan, Lord Bramwell said: His justification for rising to address their lordships was this. Supposing a case in which the police were in the wrong—interfering and doing things which they had no right to do. In the presence of lawyers, who he was sure would not contradict him, he said it was unlawful to resist them by beating them, or throwing stones at them, by charging them with horses, or in any other way than by as peaceful and pacific resistance as could possibly be shown. After the police had left the scene of the disturbance the notion that they were to be chased and pelted and beaten when on the ground was to suppose a condition of the law which was utterly untrue. In such a case as that the police had a right to resist with extreme measures. He was anxious not to be misrepresented. He did not say that if a stone was thrown at a policeman he had a right to fire on the person who threw it. He had no such right; but if his life was imperilled from continued stone throwing and manifestations of violence—if he did not know but what his life would be sacrificed, or the lives of his comrades lying disabled on the ground—he then said that there was no doubt the policemen had a right to resist the people, even to the extent of taking the lives of those committing the illegality. It was desirable that this should be known, and he challenged any one to deny that it was the law.

Lord Bramwell's challenge was taken up by Mr. Christopher Page Deane, who wrote: "Lord Bramwell maintains that opposition to a wrongdoing policeman must be only passive and pacific. I do not know where he would draw the line between this rule and the exceptions he must make to it in order to reconcile his doctrine with common sense. I will put two cases, which he might say are exceptional—*e.g.*, a policeman endeavouring to commit a murder or a rape. In these the victim of the attempt is justified in unlimited resistance, even to the extent of homicide. To come down to a more ordinary level, if policemen attempt to search my house without a warrant, my resistance is not limited to that which is passive and pacific. I claim full liberty to use all such force and means as may be requisite to expel any policeman in my house on such an errand. Or, again, if I am playing lawn-tennis on a Sunday in my garden, and a fanatical policeman, or half-a-dozen of them, come and forbid me and prevent my playing, I claim that I may in this case also expel them. I cannot conceive a case to which Lord Bramwell's doctrine of passive and pacific resistance to wrongdoing can apply, and I make bold to say he as completely misconceives the law as does Lord Randolph Churchill. No 'divinity doth hedge' a policeman. He is but a guardian of public order, with certain specific powers of applying and enforcing (*e.g.*, by arrest of offenders) those who transgress the laws relating to public order. If he is himself a transgressor the public have an inherent, necessary right to maintain order in spite of him and in opposition to him, to resist force by force, to meet an assault by a counter-assault with a view to disarm the offender. He is merely the deputy of the public. The amount of force which the public is entitled to use in self-defence against wrongdoing policemen is, however, strictly limited to that which is necessary for maintaining order. Throwing stones at them, chasing them from any place where they

have a right to be, beating them after aggression has ceased—these are contrary to public order, and therefore do not come within the right of the public."

To which Lord Bramwell made the following reply: "Mr. Deane says I completely misconceive the law and am hopelessly astray as to the 'rights and powers' of the police. This is pretty strong, and, I hope, incorrect for both our sakes—his and mine. For I entirely agree with his sensible letter, and think it would do (not for a definition, Mr. D.), but for an instruction to the police."

MR. CHRISTOPHER PAGE DEANE rashly accused Lord Bramwell of misconceiving the law, when it was Mr. Deane who had misconceived Lord Bramwell. Lord Bramwell might have returned Dr. Johnson's rude answer in a similar case, but he contented himself with kindly endorsing Mr. Deane's law. Lord Bramwell's and Mr. Deane's law that a policeman in the wrong can only be resisted by force reasonably sufficient for the purpose is only giving a policeman no less rights than a private person. If policemen in trying to get a front place for a reporter in a crowd are in the wrong, and the crowd resist them by stone throwing and charging them with horses, then the crowd is in the wrong, and if the violence becomes dangerous to life the policemen are entitled to shoot.—*Law Journal* (Eng.).

THE question of "Old Ceylon" whether it is usual for the Queen to grant a free pardon to a criminal without referring to the judge who tried the case must be answered in the negative. In the first place, the Queen never grants a free pardon of her own motion at all. If she were to do so, and the Secretary of State disagreed with the act, it would be his duty to resign. That protest is all the sanction provided by the Constitution, and no doubt the criminal would legally be pardoned. The circumstances in Ceylon no doubt are different; but we assume in favour of the Governor that he is his own Secretary of State. The practice of consulting the judges is very much older than the present constitutional relation of the sovereign to the Secretary of State in regard to the prerogative of mercy. When questions of law were involved the judges were from early times consulted, and the convicted person pardoned or executed according to their decision, a practice which was the origin of the court for the consideration of Crown cases reserved. We believe it to be the practice in England that the Secretary of State never interferes with a conviction without receiving the report of the convicting tribunal, whether judge of the High Court or justice at petty sessions. The practice arises not only in the interests of justice to the convicted person, but in order that the tribunal may vindicate its action, and that there may be no weakening of the judicial authority by any apparent slight being cast on its decision. The Secretary of State is responsible for the maintenance of this practice to Parliament, but in Ceylon the duty exists although there is no mode of enforcing it except by complaint at the Colonial Office.—*Law Journal* (Eng.).

REWARDS FOR APPREHENDING CRIMINALS.

REWARDS offered for the discovery of crime have long been part of the procedure resorted to in this country, for however public-spirited may be the majority of citizens, there are so many ramifications in the occasions and consequences of criminal acts, that no organization is equal to the speedy administration of this class of remedies. The older acts of parliament abound in inducements to public informers, and though these are seldom introduced in modern acts, the disposition to trace out and punish deliquencies is fortunately a very common attendant upon every species of wrong. Yet, as everybody knows, it is no uncommon occurrence for the government or for individuals to offer rewards for the discovery of offenders, and this quickens the diligence not only of constables, but of that large class of persons who are always looking out for employment. In working out this practice some interesting and useful decisions have been from time to time come to in the courts, for, as may be supposed, the offer of a reward brings forth

many competitors who jealously watch each other's claims, and as there is more of chance than merit in the prizes, the successful winner is subject to double scrutiny. The public policy of offering rewards has indeed often been doubted, especially where constables are concerned. A constable is bound by his very duty to search for criminals and bring them to justice. And it has been well remarked by several judges that the expectation of rewards must offer great temptation to delay an active search, by which delay the criminal might escape, or to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered, to be inert in their efforts.

On the other hand, even private individuals are too apt at times to be careless of the public advantage, if only they can by any means whatever recover the possession of their property in those cases where it has been stolen. Many persons are quite willing in the circumstances to condone any crime, or by the expenditure of a small sum to pay to the first comer whatever will induce the surrender of the proceeds of crime. Hence the legislature has thought fit to subject to a penalty those publishers of newspapers who lend themselves to the same views by circulating advertisements that no questions will be asked if stolen property shall be returned to the owner. The Larceny Act of 24 & 25 Vict. ch. 96, s. 102, containing this enactment, in turn created hardships occasionally by enabling informers to sue publishers vexatiously for these penalties. And at last by the statute 33 & 34 Vict. ch. 65, a restriction was put on these informers to this extent, that the consent of the Attorney-General was in future to be required before any such action could be brought, and a short period of limitation was also prescribed.

The offer of a reward for the discovery of a particular criminal is a species of contract which is an exception to the usual rule, whereby both parties must be known and defined, and must agree on something definite and such as is mutually assented to, before they can create the obligations of contract. This difficulty is got over by one party defining certain conditions which the unknown co-contractor is to fulfil, and which are so distinct that the unknown person and no other becomes at length the obligee whenever the circumstances arise which had been anticipated as a proper basis of a contract. It is a contract *cum omnibus* in one sense—at least in the beginning, and it develops into a contract with another individual only when the latter creates or fulfils the character which was described in the offer. Hence the disputes which usually arise in the course of these undertakings take the form of a contention that the unknown party has not done the kind of service which was to be the basis of the obligation—and though the criminal may have been discovered, yet that the discovery was not made directly or immediately by the claimant to the reward, and hence that the reward has not been earned by the person claiming it. This difficulty has presented itself under many forms, and the cases already decided involve much useful comment on the evidence and the doctrine of proximate and remote causes which arises out of such transactions.

In the case of *Williams* v. *Carwardine*, 4 B. & Ad. 621, the plaintiff had been in company with a man found murdered, and gave no information which was of value. At a later date, however, she had been severely beaten on another occasion, and when on the point of death, as was then supposed, she relieved her conscience by telling some particulars of the murder, which followed up led to the discovery and conviction of the murderer. The plaintiff did not die, but recovered, and then sued for 20*l*., the reward that had been offered for discovery. The jury found that she did give the information, but that it was not given in consequence of the offer of a reward. Three judges, however, held that the plaintiff fulfilled the conditions on which the reward had been offered, and hence that she was entitled to the money.

In another case of *Lancaster* v. *Walsh*, M. & W. 16, an offer of a certain reward had "on application to the defendant."

The plaintiff had not made any communication to the defendant, but made it to a constable whose duty it was to search for the offender. The question came to be, whether in that event the plaintiff was entitled to the reward, and it was contended that the constable by his own activity followed up the clue and the person entitled. But the court held that the plaintiff was entitled, for that the communication led to the discovery. As Alderson, B., put it, information means the communication of material facts for the first time, and the constable was merely a channel of communication, but not the originator of the information.

Again, in *England* v. *Davidson*, 11 A. & E. 857, the constable of the district apprehended the criminal and sued for the reward; whereupon it was contended that it was contrary to public policy to allow the constable to sue, for it was part of his ordinary duty to arrest criminals. The court there held that the fact of the person giving the information being a constable did not necessarily disentitle him on the ground of want of consideration. And Lord Denman, C.J., observed that there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. In short, a constable as such was said not to be disentitled to a reward of this description. In *Moore* v. *Smith*, 1 C.B. 438, the plaintiff also was a police constable, but was temporarily suspended, and he apprehended a burglar, who, after his apprehension, voluntarily confessed. And the court held him entitled to the reward, as it was by the constable's suspicions, and apprehension in consequence of them, that the criminal was really discovered. In *Thatcher* v. *England*, 3 C. B. 254, the defendant, who had been robbed of jewellery, published an advertisement headed "30*l.* reward," describing the article stolen, and concluding thus:—"The above sum will be paid by the adjutant of the 41st Regiment on recovery of the property and conviction of the offender, or in proportion to the amount recovered." A soldier on the 10th of June informed his sergeant that B had admitted to him that he was the party who had committed the robbery, and the sergeant gave information at the police station. On the 13th of June the plaintiff, a police constable, learning from one C. that B. was to be met with at a certain place, went there and apprehended him. The plaintiff by his activity and perseverance afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B. The Court of Common Pleas held that the plaintiff was not, but that the soldier was, the party entitled to the reward.

About twenty years ago an interesting case of this kind arose out of a great robbery of watches at a jeweller's shop in London. In *Turner* v. *Walker* (L. R. 2 Q. B. 301), soon after that robbery, a handbill was circulated by the defendant who offered a reward in these terms: "A reward of 250*l.* will be given to any person who will give such information as shall lead to the apprehension and conviction of the thieves. A further reward of 750*l.* will be paid for such information as shall lead to the recovery of the stolen property, or in proportion to any part thereof recovered." After the publication of the handbill Roberts brought a watch to the plaintiff to be repaired. The plaintiff, suspecting it to be one of the stolen watches, arranged with Roberts that the latter should call again and bring some more, and on the same day the plaintiff gave information to the defendant. In consequence thereof the police were employed, and Roberts was captured, and two other stolen watches were found upon him. After Roberts had been in custody three days he told the police that some female friends had informed him that the burglars were to be heard of at an eel-pie shop in 120 Whitechapel. The police accordingly there captured the burglars, who were subsequently convicted at the central criminal court. Roberts was viewed as only a receiver of the goods. The plaintiff sued for the reward, and the judge, Blackburn, J., left it to the jury to say whether the information given by the plaintiff led to the apprehension and conviction of the thieves. The judge was disposed to think that the plaintiff's information was too remote, and that the real discovery was made by the police on Roberts' information, but as the jury were in favour of the plaintiff, the question was afterwards fully argued before a court of three judges. Blackburn, J., on the argument, was still disposed to hold that the

plaintiff's information was too remote, but the other two judges held it was not, and that the plaintiff gave the clue or started the discovery. The case went to the exchequer chamber, and that court of seven judges unanimously held the plaintiff to be entitled. Kelly, C. B., said it was true that the arrest ought, in such cases, to be the immediate consequence of the information given by the plaintiff. But there was no reason why the fact of there being several steps should make any difference, if the first information led to the discovery and apprehension of the thieves. That was so in this case, and, therefore the plaintiff was justly entitled to the reward.

This last case was one of no small difficulty as it illustrated the complication caused by the first step leading to a series of other natural steps, all of which ended in the apprehension and conviction of the criminal. And the decision arrived at was one pre-eminently where common sense agreed with the rules of law. In a later case of *Bent* v. *Wakefield and Barnsley Bank* (C. P. D. 1), a somewhat puzzling case arose which involved the question whether any person can be entitled to such a reward when the criminal voluntarily surrenders himself. In this last case a handbill was published by the defendants as follows: "200*l*. Whereas, William Glover, shoddy dealer, absconded from Ossett, after committing various forgeries. Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, police superintendent, Dewsbury, as will lead to the apprehension of the said William Glover." The plaintiff was the chief constable at Exeter, and sued for the reward under the following circumstances: "One day a person (who turned out to be Glover) came to the plaintiff at the police office and said, 'You hold a warrant for me; I am wanted for forgery.'" Thereupon names and particulars were entered upon, and the plaintiff, thinking the man might be out of his mind, searched the *Police Gazette*, and ended by telegraphing to Dewsbury and getting instruction to detain Glover. The latter was detained accordingly, and all ended by Glover being locked up and ultimately tried and found guilty. The present action was brought, and one of the defences was, that it was contrary to public policy that the plaintiff should succeed, as he did no more than his public duty, and as the criminal had surrendered himself. The question was ultimately considered in connection with the previous authorities, and the judge (Grove, J.) held that the judgment should be for the defendants. The court had, according to the learned judge, already decided in *England* v. *Davidson*, that actions by constables, though not necessarily excluded, yet require very clear grounds to support them, and he thought there was no clear ground in this case.

The discovery in this last case seems to have been a mere accident without any meritorious exertion by the police superintendent, who was almost passive. Nevertheless, he took pains to make inquiry and did his duty well. But all he did was merely by way of satisfying himself whether the criminal was the real man and not a sham. Certainly there was nothing which the constable did beyond his bare duty; he did not originate or discover anything, but simply reported to headquarters. And the judge cannot be supposed to have gone wrong by deciding against an action so entirely without special merits.—*Justice of the Peace, Eng.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

Ontario.]

PLUMB v. STEINHOFF.

Title to land—Old grant—Starting point to define metes and bounds—How ascertained.

In an action of ejectment the question to be decided was whether the *locus* was situate within the plaintiff's lot No. 5, in concession 18, or within defendant's lot adjoining, No. 24, in concession 17.

The grant through which the plaintiff's title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained.

Held (affirming the judgment of the court below), STRONG and TASCHEREAU, JJ., dissenting, that such southern boundary could not be ascertained by measuring back exactly eighty-four chains from the river.

Moss, Q.C., and *Scott*, Q.C., for the appellants.

Atkinson, Q.C., for the respondents.

Ontario.]

ST. CATHARINES MILLING CO v. THE QUEEN.

Indian lands—Reserves—Surrender—Title of Crown.

Held (affirming the judgment of the Court of Appeal, 13 Ont. App. R. 148), STRONG and GWYNNE, JJ., dissenting, that the land surrendered by the Indians to the Dominion Government in 1873, by what is known as the N.-W. Angle treaty, were not, previous to such surrender, lands reserved for the Indians within the meaning of sec. 91, item 24 of the B. N. A. Act, but were public lands under sec. 92, item 5, and passed to the Province of Ontario absolutely on such surrender. Only lands specially set apart for the use of the Indians are reserved under sec. 91, item 24.

McCarthy, Q.C., for the appellants.

Cassels, Q.C., and *Mills*, for the respondents.

Ontario.]

GRAND TRUNK RAILWAY v. BECKETT.

Railway Co.—Negligence—Death caused by—Running through town—Contributory negligence—Insurance on life of deceased—Reduction of damages for.

In an action against the G. T. R. Co. for causing the death of the plaintiff's husband by negligence of their servants, it was proved that the accident occurred while the train was passing through the town of Strathroy; that it was going at a rate of over thirty miles an hour, and that no bell was rung or whistle sounded, until a few seconds before the accident.

Held (affirming the judgment of the Court of Appeal, 13 Ont. App. R. 174), that the company was liable in damages.

For the defence it was shown that the deceased was driving slowly across the track with his head down and that he did not attempt to look out for the train until shouted to by some persons who saw it approaching, when he whipped up his horses and endeavoured to drive across the track and was killed. As against this there was evidence that there was a curve in the road which would prevent the train being seen, and also that the buildings at the station would interrupt the view. The jury found that there was no contributory negligence.

Held, per RITCHIE, C.J. and FOURNIER and HENRY, JJ., that the finding of the jury should not be disturbed. STRONG, TASCHEREAU and GWYNNE, JJ., *contra*.

The life of the deceased was insured, and on the trial the learned judge deducted the amount of the insurance from the damages assessed. The Divisional Court overruled this, and directed the verdict to stand for the full amount found by the jury. This was affirmed by the Court of Appeal.

Held, that the judgment in this respect should be affirmed.

Osler, Q.C., for the appellants.

Blake, Q.C., and *Folinsbee*, for the respondent.

Nova Scotia.]

MOTT v. BANK OF NOVA SCOTIA.

Insolvent bank—Winding-up proceedings—45 Vict. cap. 23—47 Vict. cap. 39—Bank already insolvent placed in liquidation—Proceedings under what statute.

The Bank of Liverpool was placed in insolvency in 1879 under the Insolvent Act of 1875, and the Bank of Nova Scotia appointed assignee. In 1884 the assignee applied to have the insolvent bank placed in liquidation under 45 Vict. cap. 23, and 47 Vict. cap. 39. The Chief Justice of Nova Scotia granted the petition and appointed the Bank of Nova Scotia liquidator, holding that sections 2 and 3 of the Act of 1884 applied to banks. The Supreme Court of Nova Scotia affirmed this order. On appeal to the Supreme Court of Canada,

Held, STRONG and GWYNNE, JJ., dissenting, that these sections do not apply to banks, but an insolvent bank must be wound up with the same formalities as in the case of a bank not insolvent according to sections 99 to 102 inclusive of the Act of 1884, and three liquidators must be appointed in the manner therein provided.

Henry, Q.C., for the appellant.

Sedgewick, Q.C., and *Borden*, for the appellants.

British Columbia.]

SEA v. MCLEAN.

Sale of land—Sale by executors—Powers under will—Advertisement—Description—Words "more or less"—Breach of trust.

By the terms of the testator's will executors were empowered to sell so much of the real estate as might be necessary to pay off a mortgage thereon, and any other debts that the personal estate was insufficient to discharge. The executors offered for sale land described in the advertisement as "some sixty acres (more or less), Victoria District." The advertisement stated that the property to be sold adjoined M. Rowland's land, and had a frontage on the Burnside Road and on the road known as "Carey's Road."

At the sale a plan was annexed to the advertisement showing a lot coloured pink bounded by the above named roads. The auctioneer stated that the quantity was not known but would have to be determined by a survey to be made at the joint expense of vendor and purchaser. The land was offered for sale by the acre and knocked down to one S. at $36 per acre.

After the sale a survey was made and the land was found to contain 117 acres. S. claimed the whole quantity and tendered the price and a deed for signature to the executors. They claimed, however, that they only intended to sell sixty acres measured on the side adjoining Rowland's land, and to sell more would be a breach of trust on their part, as they only wanted some $2,000 to pay the mortgage and debts of the estate. S. brought a suit for specific performance.

Held (reversing the judgment of the Supreme Court of British Columbia). GWYNNE, J., dissenting, that S. was entitled to 117 acres.

Robinson, Q.C., and *Eberts*, for the appellant.

Ontario.]

BURGESS v. CONWAY.

Sale of land—Consideration in deed—Evidence—Sale of land or of equity of redemption.

B. sold to C. a lot of land, mortgaged to a loan society, claiming that it was a sale of the land for $1,400. C. claimed that it was merely a sale of the equity of redemption for $104.50, which B. had accepted as the amount due him according to the representation of C. who had figured it out, B. being incapable of figuring it himself. In the deed executed by B. the consideration was declared to be $1,400. C. paid off the mortgage for $1,081. In an action to recover the difference,

Held, TASCHEREAU and GWYNNE, JJ., dissenting, that the deed itself would be sufficient evidence of a sale of the land for $1,400 in the absence of proof of fraud or mistake, and B. was entitled to recover the difference between

that sum and the amount paid on the mortgage less the sum already paid.

Moss, Q.C., for appellants.

Robinson, Q.C., for respondents.

Ontario.]

MCLEAN v. WILKINS.

Mortgagor and mortgagee—Assignment of mortgage—Purchase of equity of redemption by sub-mortgagee—Sale of same—Liability to account.

M. executor of a mortgagee, assigned the mortgage to C., who brought suit for foreclosure, but settled such suit by assigning the mortgage to H., one of the defendants. Prior to this, the mortgage had been deposited with H. as collateral security for a loan to M. H. then purchased the equity of redemption which he sold for a sum considerably in excess of the claim of C. and his own claim. In a suit by H. to foreclose M.'s interest,

Held, reversing the judgment of the Court of Appeal (13 Ont. App. R. 467), and restoring that of the Common Pleas Division (10 O. R. 58), that H. as sub-mortgagee was bound to account to M. for the proceeds of the sale of the equity of redemption.

Blake, Q.C., and *Cassels*, Q.C., for the appellants.

Moss, Q.C., for the respondents.

Quebec.]

ROBINSON v. CANADIAN PACIFIC RAILWAY.

Damages—Misdirection as to solatium—New trial—Art. 1056 C. C.

In an action for damages against a railway company brought by the widow of a servant of the company killed in the discharge of his work, the learned judge at the trial directed the jury that in assessing the amount of damages, if they found for the plaintiff, they might consider the nature of the anguish and mental sufferings of the widow and child of the deceased.

Held, reversing the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 25, that there was misdirection. Effect of Art. 1056, C. C., considered. (See 10 Leg. News, 241.)

Appeal allowed with costs, and new trial ordered.

Scott, Q.C., and *H. Abbott*, for the appellants.

J. C. Hatton, Q.C., for the respondents.

Quebec.]

LEGER v. FOURNIER.

Sale a remere—Term—Notice—Mise en demeure—Chose jugee—Improvements.

Held, affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 3 Q. B. 124, where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have "finished and completed" houses in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the houses, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

2. The exception of *chose jugee* cannot be pleaded where the conclusions of the second action are materially different from those of the first, and so, although the present respondent attempted to exercise his right of redemption in a prior action for a less sum than stipulated, it was held that the dismissal of the first action was not *chose jugee* as regards the present action offering to pay the amount and conditions stipulated.

TASCHEREAU and GWYNNE, JJ., were of opinion in this case that appellant was entitled to $302 for improvements over and above the stipulated price, instead of $40 allowed by the court below.

DeLorimier, for appellant.

Laflamme, Q.C., for respondent.

Quebec.]

PION v. NORTH SHORE RAILWAY CO.

Navigable river—Access to, by riparian owner—Right of—Railway company responsible for obstruction—Damages—Remedy by action at law—When—43 *Vict.* (*P.Q.*) *ch.* 43, *sec.* 7, *ss.* 3 *and* 5.

Held, reversing the judgment of the Court of Queen's Bench, Quebec, 9 Leg. News, 218, TASCHEREAU, J., dissenting, that a riparian owner is entitled to damages against a railway company, although no land is taken from him, for the obstruction and uninterrupted access between his property and the navigable waters of a river, and the injury and diminution in value thereby occasioned to the property.

2. That the railway company in the present case not having complied with the provisions of 43 and 44 Vict. (P.Q.) ch. 43, sec. 7, ss. 3 and 5, the appellant's remedy by action at law was admissible.

Appeal allowed with costs.

Langelier, Q.C., for appellants.

Irvine, Q.C., and *Duhamel*, Q.C., for respondents.

Quebec.]

BRADY v. STEWART.

Litigious rights—Sale of—Arts. 1582, 83 *C. C.*

B. became holder of forty shares upon transfers from D. et al. in the capital stock of the St. Gabriel Mutual Building Society. At the time of the transfers the shares in question had been declared forfeited for non-payment of dues. Subsequently, by a judgment of a court rendered in a suit of one C., whose shares had also been confiscated for similar reasons, the shares were declared to be valid, and to have been illegally forfeited. Thereupon B., by petition for a writ of mandamus, asked that he be recognized as a member of the society, and be paid the amount of dividends already declared in favour of and paid to other shareholders. B.'s action was met, amongst other pleas, by one setting forth that B. had acquired, under the transfers in question, certain litigious rights, and that by law he was only entitled to recover from the respondents the amount he had actually paid for the same, together with legal interest thereon, and his cost of transfers.

Held, affirming the judgment of the Court of Queen's Bench, Montreal, M. L. R., 2 Q. B. 272, FOURNIER and HENRY, JJ., dissenting, that at the time of the purchase of said shares. B. was a buyer of litigious rights, and under Art. 1583, C. C., could only recover the price paid, with interest thereon.

Appeal dismissed with costs.

Doherty, Q.C., for appellant.

Curran, Q.C., for respondent.

Quebec.]

THE MAGOG TEXTILE AND PRINTING CO. v. DOBELL.

Joint stock company—31 *Vict. ch.* 25 (*P.Q.*)—*Action for calls—Subscriber before incorporation—Allotment—Non-liability.*

D. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 Vict. ch. 25 (P. Q.), but his name did not appear in the notice applying for letters patent, nor as one of the original corporators in the letters patent incorporating the company. The directors never allotted shares to D., as required by 31 Vict. ch. 25, sec. 25, and he never subsequently acknowledged any liability to the company.

In an action brought by the company against D. for calls due on the company's stock,

Held, affirming the judgment of the court below, that D. could not be held liable for calls on stock.

Appeal dismissed with costs.

Bosse, Q.C., and *Beique*, for appellants.

Irvine, Q.C., and *Stuart*, for respondents.

THE CENTRAL VERMONT RAILWAY COMPANY v. TOWN OF ST. JOHNS.

Railway bridge and railway track—Assessment of, illegal—40 *Vict. ch.* 29, *secs.* 326 & 327—*Injunction—Proper remedy—Extension of town limits to middle of navigable river—Intra vires of local legislature*—43 & 44 *Vict. ch.* 62, *P. Q.*

Held, reversing the judgment of the Court of Queen's Bench, Montreal, FOURNIER and TASCHEREAU, JJ., dissenting, (1) that the portion

of the railway bridge built over the Richelieu river and the railway track belonging to appellant's company within the limits of the town of St. Johns, are exempt from taxation under section 326 & 327 of 40 Vict. ch. 29, P. Q.

(2) That a warrant to levy rates upon such property for the years 1880-83 is illegal and void, and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same.

As to whether the clause in the Act of Incorporation of the town of St. Johns, P. Q,. extending the limits of said town to the middle of the Richelieu river, a navigable river, is *intra vires* of the legislature of the Province of Quebec, the Supreme Court of Canada affirmed the holding of the court below that it was *intra vires*.

Appeal allowed with costs.

Church, Q.C., for appellant.

Robidoux, Q.C., for respondent.

COURT OF APPEAL.

RATTE v. BOOTH.

Riparian proprietor—Navigable stream—Reservation in Crown grant—Statute of Limitations.

A certain water lot on the river Ottawa was granted by the Crown to A. The description in the patent covered the lot and two chains distant from the shore, but there was a reservation of "all mines of gold and silver, the free uses, passage, and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found in or under, or be floating through or upon any part of the said parcel of land hereby granted." A. granted to P. the lot with certain exceptions, but including the part covered by water, and P. in 1867 granted to the plaintiff part of the lot down to and bounded by the water's edge. The plaintiff had been on the place on contract for purchase for a year before the conveyance, and had built a dwelling-house and a boat-house floating wharf, the latter extending at the time sixteen feet outwards from the bank into the stream, and being afterwards enlarged so as to extend forty feet into the stream. By means of this wharf the plaintiff carried on business as a letter of pleasure boats, and brought this action complaining of injuries to his business, and to him as a riparian proprietor by the deposit of refuse from the defendant's mills in the water in front of his land, hindering access from his wharf to the actually navigable part of the river, and fouling the waters of the stream upon or in contact with his land.

It was contended that the plaintiff had no title as a riparian proprietor, as P. owned the portion of the water lot outside of the plaintiff and could bar him from access to the river, and also that the reservation in the patent was repugnant to the rest of the grant, which should be read as giving the whole lot there specified.

Held (affirming the judgment of the Chancery Division, 11 O. R. 491) BURTON, J.A., dissenting, that the plaintiff was entitled to recover damages for the injuries complained of.

Per HAGARTY, C.J.O., and OSLER, J.A.—For the purpose of this suit the plaintiff is to be regarded as a riparian proprietor. How can wrong-doers in no privity with P. raise the question of his right to block the plaintiff from the water. The Crown, owning the bed of this navigable river, could grant a portion thereof, reserving the public right of user, which is the meaning of the reservation in the patent.

Per PATTERSON, J.A.—The terms of the reservation in the patent do not point to the public right of navigating the waters. The patent cannot be construed as reserving the use of the waters in any sense, or for any purpose different from the reservation of the mines; and the mines cannot be treated as reserved for the public benefit except in a sense foreign to the present discussion. The public right to the use of navigable waters is the right of each individual, and stands on a different footing—it does not come by grant from the Crown, but is a paramount right to be curtailed only by act of the legislature. A public easement cannot be the subject of an exception in favour of the grantor. If the exception were construed as perpetuating the *jus publicum*, it would be repugnant to the grant in its operation under the statute 23 Vict. ch. 2, s. 35, and would be void. The true reading of the patent is that the reservation touching navigable waters is applicable only to the

other parts of the lot, and not to the two chains of the river bed. The whole lot vested in A. free from the asserted *jus publicum;* and the plaintiff, as against his partner P., and *a fortiori* as against wrong-doers, has acquired a title to the river portion under the Statute of Limitations.

Per BURTON, J.A.—The plaintiff cannot be regarded as a riparian proprietor; the person filling that position is P., and on his filling in the lot, as he is entitled to do to the limit of his grant, the plaintiff will be entirely cut off from the stream.

The plaintiff, a trespasser, cannot complain of others trespassing on portions of the property of which he is not in possession, although it may interfere with his access to the portion of which he is in possession.

If the words of the reservation in the patent extend to the right of navigation the reservation is absolutely void. The statute 23 Vict. c. 2, s. 35, gives to the Crown the right to grant the bed of the river and the water upon it free from any rights *publici juris*. The Statute of Limitations could give the plaintiff no title to any part of the water-covered land, except that actually occupied by his floating wharf and boat-house.

BAKER AND THE MERCHANTS' BANK v. ATKINSON ET AL.

Lease, determined by forfeiture—Right of distress—One year's rent payable on insolvency—8 Anne ch. 14—Payment of rent to save goods.

By the terms of a lease it was stipulated that "if the said lessees shall make any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the said lease shall immediately become forfeited and void, and the full amount of the next ensuing one year's rent shall be at once due and payable."

Held (1), affirming the judgment of the Q. B. D. 11 O. R. 735, notwithstanding the provisions of 8 A. ch. 14, s. 6, that a distress for the year's rent falling due next after an assignment by the lessees for the benefit of creditors was illegal and void, the statute applying only to cases where the tenancy has been determined by lapse of time, not by forfeiture; but, *Held* (2), in this reversing the same judgment, that money paid to the lessors by the solicitor of certain execution creditors in full of such rent, with knowledge of all the facts, so as to prevent a sacrifice of the goods, could not be recovered back, either by the execution creditors or the assignee, the amount having been repaid to the soliciter out of the proceeds of such goods when sold by the sheriff as was expected by the solicitor would be done when making such payment.

CHANCERY DIVISION.

Boyd, C.] [September 29.

RE CLARK AND THE UNION INSURANCE CO.

Dominion Winding-up Act—Application to Provincial corporations—Constitutionality—R. S. C. ch. 129.

Held, that the Winding-up Act, R. S. C. ch. 129, is within the confidence of the Dominion Parliament under section 91, article 21 of the British North America Act, and that the present company, though incorporated under a Provincial charter, is subject to its provisions. *Gillespie* v. *The Merchants' Bank*, 10 S. C. R. 312, distinguished.

Bain, Q.C., for the petitioners.

Walter Cassels, Q.C., for Shoolbred, a creditor.

Ferguson, J.] [September 30.

RE HAGUE, TRADERS' BANK v. MURRAY.

Husband and wife—Dower—Equity of redemption—Building mortgage.

In the course of the administration in the Master's Office of the lands and personal estate of William Hague, it appeared that prior to his decease William Hague was seized in fee simple absolute of a certain vacant lot in the city of Toronto, and that in the year 1883, desiring to build upon the lands, he gave a mortgage of the land to a loan company, and executed at the same time a contemporaneous agreement setting out that the mortgage

moneys were to be advanced as the building progressed upon progress certificates of the architect of the house.

Evidence was given to show that the money was actually advanced and went into the building. Afterwards, on March 10th, 1886, after the completion of the building, William Hague died. In the Master's Office his widow claimed that she was entitled to dower in the full value of the land, though the above mortgage still subsisted upon it and had to be paid off out of the purchase moneys. It was objected, on behalf of the creditors, that she was only entitled to dower out of the equity of redemption, and in the value of the equity of redemption after paying off the mortgage.

Held, reversing the decision of the Master in Ordinary, that the widow was entitled to dower out of the equity of redemption in the full value of the lands.

C. Moss, Q.C., and *A. H. F. Lefroy*, for the creditors.

J. Reeve, for the widow.

H. A. Reesor, for the executor and trustee.

PRACTICE.

Rose, J.] [September 9.

SMITH v. CLARK.

Discovery—Action on building contract—Examination of architect.

In an action against the trustees of an Orange Lodge for the price of work and materials furnished in building a hall in which the principal defendant was examined and could give no information as to the matters in dispute, and it appeared from his examination that the architect employed by the defendants was the only one who could give the information sought, an order was made for the examination of the architect for the purpose of discovery only.

O'Sullivan, for the plaintiff.

Gwynne, for the defendants.

Rose, J.] [Sept. 9.

ROSS v. THE CANADIAN PACIFIC RY. CO.

Change of venue—Preponderance of convenience.

An action for trespass to land by cutting timber, etc., was commenced in Toronto where the solicitors for the plaintiff, the defendants and the third parties resided. The plaintiff lived in Quebec and his agent in Toronto. The third parties, who were really in the position of defendants, lived in Pembroke. The defendants swore that they would have at the trial four witnesses from Pembroke or vicinity, one from North Bay, two from Dakota, U.S.A., and one from Ottawa. The plaintiff swore to eight witnesses, all in Toronto or west of Toronto. The *locus in quo* was neither in the County of York nor Renfrew.

Held, that there was not sufficient preponderance of convenience in favour of Pembroke to warrant changing the venue to that place.

Shroder v. *Meyers*, 34 W. R. 261, followed.

W. H. P. Clement, for the plaintiff.

MacMurchy, for the defendants.

Rose, J.] [September 9.

KELLY v. WOLFF.

Landlord and tenant—Ejectment—Title of landlord, expiry of—Bona fide defence—Ejectment Act, ss. 65, 66.

In an action of ejectment by a landlord against a tenant whose term had expired,

Held, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term, and to raise such defence it was not necessary for the tenant to go out of and then resume possession.

Sections 65 and 66 of the Ejectment Act do not apply where a *bona fide* defence or dispute is raised; and in this case a motion by the plaintiff for security for damages and costs, under these sections, was refused.

Quære, whether ss. 65 and 66 would apply to any case where the tenant actually gives up possession, so that the landlord is in possession, and then retakes.

Alan Cassels, for the plaintiff.

Aylesworth, for the defendant.

Rose, J.] [Sept. 9.

NICHOLSON v. LINTON.

Change of venue—Preponderance of convenience.

An action to recover the price of a quantity of steel, the principal defence being inferiority in quality. The plaintiffs lived in England, and their Montreal agent sold the steel to the defendant at Galt, where the latter lived, delivered the steel there, attended there for the purpose of endeavouring to settle the dispute, and was present at a test made in Galt.

The plaintiffs laid the venue at Cornwall, and the defendant moved to change it to Berlin, fourteen miles from Galt.

All the defendant's witnesses, six in number including the defendant himself, lived in Galt. The plaintiffs named no witnesses except the Montreal agent, but after notice had been given of the motion to change the venue, the agent directed one bar of the steel to be reshipped from Galt to Montreal to have a test made, and then said generally that he would require to call experts from Montreal to prove the result of the test, but did not say how many. The defendant swore that the expense to him of taking witnesses to Cornwall would be about $135, and to Berlin about $14.

Held, that the very great preponderance of convenience was in favour of Berlin, and the venue was therefore changed.

Shroder v. *Meyers*, 34 W. R. 261, distinguished.

Osler, Q.C., for the plaintiffs.

Holman, for the defendant.

Rose, J.] [Sept. 9.

MCKAY v. PALMER.

Prohibition—Division Court—Matter of practice.

A motion for prohibition to a Division Court on the ground that the action was revived by the administrator of the plaintiff without serving a summons or notice on the defendant as required by the Division Court rules, was refused, the irregularity complained of being a mere matter of practice, and therefore not reviewable in prohibition.

Caswell, for the motion.

Holman, contra.

Ferguson, J.] [September 13.

IN RE SOLICITOR.

Solicitor—Delivery of bill to third party—Right to taxation—Præcipe order.

Upon the application of a mortgagor, the mortgagee's solicitor was ordered by a county judge to deliver to the applicant a copy of the bill of costs of a sale under the power in the mortgage (see *ante*, p. 297), and the bill was delivered pursuant to the order.

Held, that although the delivery was, under s. 45 of the Attorneys Act, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy of the bill had not necessarily the right to tax the bill; and a *præcipe* order for taxation was set aside, when at the time of making it there were two matters in dispute, viz.: whether payment as such had been made by the mortgagees to the solicitor, and whether the mortgagees had precluded themselves from the right to tax the bill.

Hoyles, for the solicitor.

E. Douglas Armour, for the mortgagor.

OSGOODE HALL LIBRARY.

[Compiled for THE CANADA LAW JOURNAL.]

The following books have been received at the Library during July, August and September, 1887:—

American Reports (various States), 202 vols.

Annual Register for 1886. London, 1887.

Appleton's Cyclopædia (N. S.), Vol. II. New York, 1887.

Brett's Leading Cases in Equity. London, 1887.

Chalmer's Bills of Exchange. 3rd edition. London, 1887.

Connoly's New York Citations. Albany, 1887.

Cox and Grady on Elections. 14th edition. London, 1885.

Duncan's Mercantile Cases. London, 1887.

Devlin on Deeds. San Francisco, 1887.

Elphinstone and Clark on Searches. London, 1887.

Encyclopædia Britannica. 9th edition. Vol. XXII. Edinburgh, 1887.

Erichsen on Concussion of the Spine. London, 1882.

Everest's Defence of Insanity. London, 1887.

Hallilay's Examination Questions. 14th edition. London, 1886.
Harris's Post Mortem Hand-book, London, 1887.
Haviland's Table of Cases. 2 vols. Rochester, 1887.
Law Times Reports (N. S.), Index to Vols 31 to 40. London, 1887.
Macassey's Private Bill Legislation. London, 1887.
Mair's Church Law. London, 1887.
Manning's Serjeant's Case. London, 1840.
Myer's Digest Texas Reports. St. Louis, 1881-3.
Odgers on Libel and Slander. 2nd edition. London, 1887.
Ontario Statutes. Toronto, 1887.
Page's Injuries to the Spine, London, 1885.
Posey's Texas Civil Digest. St. Louis, 1887.
" " Criminal Digest. St. Louis, 1886.
Rorer on Inter-State Law. Chicago, 1879.
Salmon's Crown Colonies of Great Britain. London.
Slater's Mercantile Law. London, 1884.
Spencer's Agricultural Holdings Act. London, 1883.
Spens and Younger's Employers and Employed. Glasgow, 1887.
Stephen's National Biography. Vols. X. and XI. London, 1887.
Stephen's Digest Criminal Law. 4th edition. London, 1887.
Stephen's Law of Evidence. 5th edition. London, 1887.
Stoke's Anglo-Indian Codes, Vol. I. Oxford, 1887.
Taylor on Evidence. From 8th English edition. Philadelphia, 1887.
Thring's Criminal Law of the Navy. London, 1877.
Todd's Parliamentary Government in England. Vol. I. London, 1887.
Waite's Questions on Equity. London, 1887.
Warde's Practice of Interpleader. London, 1887.
Wharton's International Law. 3 vols. Washington, 1886.
Withrow's History of Canada. Toronto, 1886.
Wood's Solicitors' Reports on Administrations and Executorships. London, 1887.
Wurtzburg on Building Societies. London, 1886.

FLOTSAM AND JETSAM.

The *Illustrated News* Co., of New York, publishes an American edition of the *Illustrated London News*, a paper so well known in all parts of the world as to make any comments of ours as to its excellence a waste of words. We can, however, bear testimony to the excellence of the edition before us. What the arrangements with the English Publishing House are we know not, but in comparing the issue before us with that in England one is tempted to express one's sentiments after the manner of the bewildered Irishman, who, in reference to another matter gave vent to his thoughts by the remark that "both were so like each you could not tell t'other from which!" The office of publication is 237 Potter Building, New York. The price is $4 a year in advance, or 10 cents a copy. At such a price it must have an enormous subscription list.

A PERIPATETIC JUSTICE.—Constable Heffernan went to arrest James Walker, of Elderslie, who keeps a groggery on the roadside, five miles from Chesley. James took to the woods, and Patrick took after him. After a hot chase James surrendered, and was lugged along to the roadside, where police magistrate Vanstone sat in his buggy, calmly viewing the race. His Worship tried him on the spot, convicted him without the right of appeal, and fined him fifty dollars and costs. It is a great convenience to delinquents, thus to keep a travelling court on the concession lines.—Bruce *Herald*.

THE OLD MAN ELOQUENT.—David Dudley Field, of the New York Bar, though he has attained the ripe old age of eighty-three years, is still forcible and eloquent. At a recent meeting of the American Bar Association he concluded a debate on the subject of Codification of the Law, by a speech of half an hour's duration with the following peroration, which deserves the attention of lawyers everywhere: "What is the reason of the indifference of lawyers to the reform of the law? The truth must be told. Too many of our calling look upon it not as a profession but as a craft. And it is because they so regard it that they do not strive to elevate it. The majority of the Bar of this country have hitherto opposed every great legal reform. I challenge the student of history to find any important

law reform in our times advanced by the great body of lawyers! Every such reform has been carried by the people with the aid of a minority of lawyers. Take heed in time. You of the majority opposed the abolition of imprisonment for debt. You opposed giving woman her rights. You have opposed every attempt at codification, and it will be so always until you arrive at a better sense of the dignity and the duty of the profession. Profession, I call it, and not a craft. We belong to a learned and noble profession, which has held in its ranks some of the greatest men of all time from Cicero to Bacon, from Bacon to Mansfield, from Marshall and Story to the great judges and lawyers of our day. Let us show ourselves worthy of them! Let us act as becomes their brethren, and do all we can to elevate this profession, which is our pride and boast, and make it a means of beneficence to all the people of the land."

"A GENERATION of Judges, by their Reporter," is the title of a little book of biographical sketches of Cockburn, Lush, Quain, Archibald, Kelly, Cleasby, Willes, Byles, Martin, James, Mellish, Thesiger, Holker, Amphlett, Hall, Hatherley, Malins, Cairns, Jessel, Philimore, Watkin Williams; and of Karslake and Benjamin, who were not judges. This is a very entertaining book, written in a light, rapid, vivid style, evincing strong powers of discrimination, and the greatest boldness and independence. The author's favourites are Cockburn, James, Cairns and Jessel. The sketches are enlivened by many amusing and interesting reminiscences. We are told how Lord Chief Justice Cockburn, being audaciously called on for a song at a bar dinner, sang "The Somersetshire Poacher"—

"It is my delight on a shiny night,"

"in a broad west country dialect, with great gusto and in good style;" how Lush was, "as a judge, guilty of the eccentricity of preaching on Sundays," and instead of saying to capital convicts, "and may God have mercy on your soul," would say, "and may you be led to seek and find salvation!" how he was fond of wine, and once, on a cry of "Lush and Shee!" some one said, "that is the old toast of wine and woman;" how Kelly, being attacked at night on the street by two ruffians, although a very aged man, backed against a railing and beat them off with his cane; how on the trial of Tawell, the Quaker, for poisoning, he suggested in the defence that the victim was poisoned by eating too many apples, whence he got the name of "Applepip Kelly;" how the kind-hearted Cleasby said to a prisoner, "you are one of the worst men I ever tried," and then gave him a month; how Byles used to ride a horse which the wags named "Bills," in order to realize "Byles on Bills," but which he and his clerks called "Business," so clients could be told he was "out on 'Business';" how he "amused his last days with theology, wrote a religious book," and left more than a million of dollars; how Martin was rumoured to have an interest in racing-horses, and how he sentenced an offender, "you are an old villain, and you'll just take ten years' penal servitude;" how on a summer circuit, his cushioned seat getting hot, he ordered a soap-box to sit on; how James and Mellish were familiarly known as "Flames and Hellish;" how Hatherley went to church every morning before breakfast; how Malins "gloried in his bad law," and "his personal virtues were judicial vices," and how "his death was accelerated by that failing of most lawyers, bad riding;" how Cairns was fond of a posy in his button-hole, taught in the Sunday School, and "to hear Moody and Sankey was, he declared, the richest feast he could have;" how Jessel, when overruled by the House of Lords, would exclaim when the decision was quoted, "don't cite to me the decisions of remote judges;" how he had trouble with his h's; how Karslake was a bit of a dandy, and on a wet day went to take a "view" in elaborate boots and gaiters, and how he left a million dollars; how Benjamin tied up his papers, dropped his argument, and left the House because Selborne said "nonsense!" and how he drew his own will, and it "held water." The following of Kelly is too good to be cut short: "'My good woman,' he would say to a witness, 'you must give an answer in the fewest possible words of which you are capable, to the plain and simple question, whether, when you were crossing the street with the baby in your arm, and the omnibus was coming down on the right side, and the cab on the left side, and the brougham was trying to pass the omnibus, you saw the plaintiff between the brougham and the omnibus, or between the brougham and the cab, or between the omnibus and the cab, or whether, and when you saw him at all, and whether or not near the brougham, cab or omnibus, or either or any two, and which of them respectively.'" This reminds us of a college president, who, addressing a Sunday School, said, "children, I am about to give you an analysis of the character of Moses. By an analysis you will understand the converse of synthesis." We are not informed of the name of the author of this very clever little book. The London *Law Times* does not approve the book, but we are just ignorant enough to like it.—*Albany Law Journal.*

Canada Law Journal.

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DIARY FOR NOVEMBER.

1. Tues. ..All Saints' Day. First Intermediate Examination. Sir Matthew Hale born 1609.
3. Thur. ..Second Intermediate Examination.
6. Sun.....*22nd Sunday after Trinity.*
8. Tues. ..Sittings of Court of Appeal. Solicitors' examination.
9. Wed ..Barristers' examination.
12. Sat ..W. B. Richards, 10th C. J. of Q. B. 1868. J. H. Hagarty, 12th C. J. of Q. B. 1878.
13. Sun. ..*23rd Sunday after Trinity.*
14 Mon ..J. B. Macaulay, 1st C. J. of C. P. 1849.

TORONTO, NOVEMBER 1, 1887.

WE publish elsewhere a recent order of the Supreme Court giving authority to the Registrar to exercise all the powers of a judge of the court sitting in chambers, with some few exceptions. This is a very sensible provision, and, so far as the individual is concerned, could not have been bestowed upon one better qualified than the most courteous and efficient officer who now discharges the duties that appertain to the position. Mr. Cassels has been some twelve years Registrar of the court, and has performed his duties with the greatest credit to himself and satisfaction to the profession. The Rule of court adds dignity to the office and is a deserved mark of confidence on the part of the judges.

HON. LEWIS WALLBRIDGE, CHIEF JUSTICE OF MANITOBA.

HON. LEWIS WALLBRIDGE died at his residence in Manitoba on 20th October last at the age of seventy-one. He was born in Belleville on the 27th of November, 1816, being a grandson of Elijah Wallbridge, a U. E. Loyalist, who settled in Canada shortly after the War of Independence, and son of Wm. H. Wallbridge, a lumber merchant in Belleville. The family came from Dorsetshire, in England, and, taking sides with the Duke of Monmouth in the Rebellion against King James, had to leave England on that account.

Mr. Wallbridge received his education under the late Dr. Benjamin Workman, in Montreal, and at Upper Canada College, Toronto. His legal studies were conducted in the office of the Hon. Robert Baldwin, of Toronto, at the same time with Sir Adam Wilson, Chief Justice of the Queen's Bench.

The late Chief Justice was called to the Bar, in Hilary Term, 1839, and was made a Queen's Counsel in 1856. In 1858 he entered Parliament, representing West Hastings, and some time afterwards became Solicitor General as a member of the Macdonald-Dorion Government. Whilst Solicitor General he was, in 1863, elected Speaker of the House, and was the first Speaker of the House at Ottawa. He held that office for over four years and presided during the debates on the exciting question of Confederation.

After retiring from political life he practised law in Belleville, and on the death, in 1882, of Hon. E. B. Wood, Chief Justice of Manitoba, was appointed his successor. He heard and gave judgment on the first of the recent injunction cases against the Red River Valley Railway, sitting, it is said, for ten consecutive days, aggravating the disease which eventually caused his death. Mr. Wallbridge was a sound lawyer, his strong point being his familiarity with real property law; he had also a large criminal practice. His counsel business was very large; his name appearing at one time in

almost all the important cases in the eastern district.

His remains were taken to Belleville on October 25th last and there buried. The funeral was attended by an immense number of people desirous of paying their respects to one who had been for so many years an honoured citizen of his native place, and respected and loved for his good qualities by all who knew him.

RECENT ENGLISH DECISIONS.

The *Law Reports* for October comprise 19 Q. B. D. pp. 357-509; 12 P. D. pp. 185-195; 36 Chy. D. pp. 1-112.

SHIP—GENERAL AVERAGE—DISCHARGE OF PART OF CARGO BEFORE COMMENCEMENT OF MEASURES FOR GETTING OFF SHIP, EFFECT OF.

The first case in the Queen's Bench Division to which we draw attention is *The Royal Mail Steam Packet Co.* v. *English Bank of Rio de Janeiro*, 19 Q.B.D. 362. In this case a steamer carrying with other freight a large quantity of specie ran aground and lay in a dangerous position. Soon after the vessel struck the master landed the specie, which weighed only about a ton and a half, and placed it in a place of safety, and it was ultimately forwarded to its destination by another vessel, but for the purposes of the case it was to be treated as having been conveyed by the stranded steamer. After the specie had been thus landed the master jettisoned part of the cargo, and had recourse to other extraordinary measures for getting off the vessel. These measures proved effectual, and the vessel continued her voyage with the cargo remaining on board. The question for the court was whether the losses and expenses incurred in getting the steamer off, and the expenses incurred in landing and conveying the specie were or were not general average to which the owners of the specie were liable to contribute. The court (Wills and Grantham, JJ.) held that they were not.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR NECESSARIES SUPPLIED TO WIFE—ADULTERY OF WIFE—CONNIVANCE BY HUSBAND—CONDONATION.

Wilson v. *Glossop*, 19 Q.B.D. 379, was an appeal from the Sheffield County Court. The action was brought for necessaries supplied to the defendant's wife. In August, 1885, the defendant charged his wife with adultery and turned her out of doors, whereupon she went to reside with her mother, the plaintiff, who supplied her with board and lodging. The defendant subsequently petitioned in the Probate and Divorce Division for a dissolution of his marriage on the ground of his wife's adultery, and at the trial the jury found that the wife had commited adultery, and that the petitioner had not condoned the offence, but that he had connived at it. The petition was thereupon dismissed. Under these circumstances the Court (Matthew and Cave, JJ.) held that the husband was liable for the necessaries furnished his wife, and the judgment of the County Court was reversed.

PRACTICE—AMENDMENT—CLAIM BARRED BY STATUTE OF LIMITATIONS.

In *Weldon* v. *Neal*, 19 Q.B.D. 394, the Court of Appeal affirmed a decision of a Divisional Court striking out certain amendments to the statement of claim which set up fresh causes of action, which at the time of such amendment were barred by the Statute of Limitations, although not barred at the date of the writ.

PRACTICE—COSTS—ORDER 65 R. 1 (ONT. RULE 428)—CLAIM—COUNTER-CLAIM.

Wight v. *Shaw*, 19 Q.B.D. 396, was an appeal from Denman, J., on a question of costs. The plaintiff's claim was for rent, which was admitted by the defendant, who, however, counter-claimed a larger amount for damages on account of the alleged insanitary condition of the demised premises. The case was tried by a jury who found for the defendant on the counter-claim £17 16s. damages. The Judge at the trial ordered judgment to be entered for the plaintiff for the amount claimed by him, viz., £78 15s., with costs down to the filing of the counter-claim; and that judgment should be entered for the defendant for the £17 16s. with costs of the counter-claim and subsequent thereto, including the costs of the trial. On appeal, the court (Lord Esher, M.R., Lindley and Lopes, LL.J.) held that there was no "good cause" shown for such an order, and that the Judge at the taial had therefore no jurisdiction to prevent the costs following the event.

Recent English Decisirns.

MASTER AND SERVANT—"BREACH OF STATUTORY DUTY—VOLENTI NON FIT INJURIA—EMPLOYERS' LIABILITY ACT 1880 (43 AND 44 VICT. C. 42) (49 VICT. C. 28 [O.])

Baddeley v. *Earl Granville*, 19 Q.B.D. 423, is another case in which the principle laid down in *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, is again discussed. The plaintiff's husband had been employed at the defendant's coal mine. One of the statutory rules regulating the working of the mine required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular custom at the mine, as the deceased well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. The action was brought under the Employers' Liability Act 1880 (see 49 Vict. c. 28 [O.]), and it was contended that the case came within the rule laid down in *Thomas* v. *Quartermaine*, and that the maxim *volenti non fit injuria* applied. But the court (Wills and Grantham, JJ.) held that the injury having arisen from the breach of a statutory duty, that maxim was not applicable, and that this distinguished the case from *Thomas* v. *Quartermaine*.

SALVAGE—SALVED AND SALVING VESSELS OWNED BY SAME PERSON—BILL OF LADING—SEAWORTHINESS, EXCEPTIONS QUALIFYING IMPLIED WARRANTY OF.

Proceeding now to the cases in the Probate Division, the first which claims attention is *The Cargo ex Laertes*, 12 P.D. 187. This was an action to recover salvage under the following circumstances: A steamship became disabled at sea owing to the breaking of her fly wheel shaft through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care. The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause "warranted seaworthy only as far as ordinary care can provide;" the second, "warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers and crew can ensure it;" and the third, "owners not to be liable for loss, detention or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at the time of shipment, provided all reasonable means have been taken to secure efficiency." A vessel belonging to the same owners as the disabled vessel towed the latter into port. The action was brought by the owners, master and crew of the salving vessel against the owners of cargo in the salved vessel; and it was held by Butt, J., that the owners of the salving vessel were entitled to salvage, notwithstanding they were at the same time owners of the vessel salved, and that the owners of cargo in the salved vessel had no remedy for breach of the contract of carriage, because the exceptions in the bills of lading above mentioned constitu ed a limited warranty of seaworthiness at the commencement of the voyage, of which there had been no breach.

GARNISHEE—PAY OF SURGEON IN R.N.—ATTACHMENT OF DEBTS.

In *Apthorpe* v. *Apthorpe*, 12 P.D. 192, the Court of Appeal (Cotton, Lindley and Bowen, LL.J.,) held that the pay of a surgeon in the Royal Navy in active service not being assignable, could not be attached.

INJUNCTION—IMITATION OF PLAINTIFFS' GOODS—ACCOUNT.

Lever v. *Goodwin*, 36 Chy. D. 1, was an action to restrain the defendants from selling soap in packets so closely resembling those in which the plaintiffs had been in the habit of bringing out their soap, as to be calculated to deceive purchasers. It was held by Chitty, J., that though the retail dealers who bought soap from the defendants would not be deceived, the defendants, by their imitation of the plaintiffs' packet, put into the hands of the retail dealers an instrument of fraud, and ought to be restrained by injunction. An injunction was accordingly granted, and an account directed of the profits made by defendants in selling soap in the packets in which it was held that they were not entitled. The defendants appealed, and it was held by the Court of Appeal (Cotton, Lindley and Bowen, LL.J.) that the injunction had been rightly granted, and that the account was in proper form and ought not to be limited, as the defendants contended, by excluding from it soap which the

retail dealers sold to persons who bought it as the defendants' soap. It may be noted that the plaintiffs' case failed so far as they relied on having a trade mark; but it was held that the case was within the common law doctrine that a man cannot pass off his goods as those of another.

MORTGAGOR AND MORTGAGEE—BANK—LOAN TO CUSTOMER—TRANSFER OF STOCK BY THREE PERSONS TO SECURE LOAN—TRUST—RETRANSFER TO NOMINEE OF BORROWER—LIABILITY OF MORTGAGEE.

Magnus v. *Queensland National Bank*, 36 Chy. D. 25, is a decision of Kay, J., which illustrates the duty of mortgagees to retransfer securities on the repayment of the loan, so that they may revest in the same parties as those from whom they received them. In this case Goldsmid, a stock broker, was one of three trustees, and he proposed to his co-trustees to sell certain B. stock belonging to the trust, and purchase N. E. stock with the proceeds. In order to carry out this proposed change of investment the co-trustees concurred with Goldsmid in executing a deed of transfer of the B. stock to Buchanan and Smith who were respectively manager and accountant of the defendant bank. Goldsmid was a customer of the defendant bank, and borrowed a large sum of money from them, and, unknown to his co-trustees, deposited the transfer of the B. stock with them as security for the loan, Buchanan and Smith being transferees as trustees for the bank, and Goldsmid representing to them that he had the authority of his co-trustees to give the stock as security. The deed of transfer was sent to the B. company, and registered after notice to the co-trustees. In February, 1882, Goldsmid paid off the loan, and then the bank, at his request, and without notice to the co-trustees, authorized Buchanan and Smith to transfer the B. stock to purchasers from Goldsmid. Goldsmid received the purchase money and invested the same in the purchase in his own name of N. E. stock. This stock he subsequently sold, and converted the proceeds to his own use; he however paid dividends on this investment to the *cestui que trust* for some time, but ultimately absconded. The present action was then brought by the *cestui que trust* of the trust estate and the co-trustees to compel the bank to make good the loss of the B. stock to the trust estate, on the ground that they, by transferring the stock to purchasers, improperly placed the proceeds of the B. stock in Goldsmid's sole control, whereas they should have retransferred the stock to the three trustees by whom it had been transferred to them; and Kay, J., held that the bank had acted improperly, and was therefore liable to the plaintiffs as claimed. He thus states the case at p. 35:

A customer of a bank borrows money of them, and hands to them as security a transfer of railway stock by himself and two other persons—his co-trustees. Subsequently he pays off the loan, and the bank, instead of retransferring to the three mortgagors, transfer to a nominee of their customer. That, for the purpose of this case, is precisely as though they had transferred to himself or any stranger. Thereby the stock was lost to the trust estate In my opinion, the bank are liable for the value of the B. stock at the time when they transferred it.

COMPANY—SHARES—FRAUDULENT MORTGAGE OF SHARE CERTIFICATES—RIGHT OF LEGAL OWNER OF SHARES AS AGAINST MORTGAGEE—ESTOPPEL.

Passing now to the *Colonial Bank* v. *Hepworth*, 36 Chy. D. 36, we have a decision of Chitty, J., upon the conflicting rights of the legal owner and an equitable mortgagee for value without notice. The subject-matter of the contest was certain shares of the New York Central Railway Co. For these shares the company issues to the registered shareholders share certificates on the back of which there is a blank form of transfer, and a blank form of power of attorney to execute a surrender and cancellation of the certificate. The mode of transfer was as follows: The registered shareholder signed the transfer and power of attorney, leaving the name of the transferee blank, and when this blank transfer reaches the hand of some holder who desires to be registered, his name is filled in by himself, or on his behalf, and the certificate, on being left with the company, was cancelled by them, and the transferee registered as owner, and a new certificate issued in his name. In August, 1883, the defendant employed Thomas & Co., a firm of brokers, to buy him 240 shares of this stock, which they accordingly did, and he left the certificates in their hands with directions to get him registered as owner. Thomas & Co. subsequently, unknown to the defendant, fraudulently deposited these share certificates with the plaintiff as security for a loan to themselves. At the time of the deposit the name of the transferee had not been filled in. Fearing that their fraud would be

discovered by the defendant, they applied to the bank for the share certificates, on the ground that they wished to send them in for registration, and the officers of the bank re-delivered the certificates, supposing that Thomas & Co. were going to get themselves registered as transferees. Thomas & Co., however, filled in the defendant's name as transferee, and sent the shares in for registration in his name, and received from the company a receipt for the certificates which they handed to the plaintiffs. One of the firm of Thomas & Co, who had been guilty of the fraud, subsequently absconded, and the bank then sent to the railway company's office the receipt for the old certificates and demanded the new ones, which the company assumed they were entitled to as holders of the receipt, and the new certificates were accordingly handed to them.

The suit was brought to have it declared that notwithstanding the shares stood in the defendant's name, the plaintiffs were entitled thereto, and to compel the defendant to execute a transfer thereof. The defendant counter-claimed, praying that the plaintiffs should be ordered to deliver the shares to him. Chitty, J., held that the case did not fall within the principle of estoppel laid down in *Goodwin* v. *Roberts*, 1 App. Cas. 476, and that the defendant was the legal owner of the shares and entitled to have the new certificates delivered to him. The right principle to adopt with reference to shares of this kind with transfers in blank, he considered to be this, that when the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bona fide* holder for value of the certificates, for the time being, an authority to fill in the name of the transferee, and is estopped from denying such authority, and to the extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being. But he goes on to observe that by the delivery only an inchoate right passes, and that the title by unregistered transfer is not equivalent to a legal estate in the shares or a complete dominion over them. The plaintiffs, he considered, never had the complete legal title, and their inchoate title was defeated by the defendant acquiring *bona fide* for value by the registration of the shares in his name a complete legal title thereto.

SELECTIONS.

SCHOOL TEACHER—RIGHTS AND LIABILITIES IN RELATION TO HIS PUPIL.

1. Relation of Teacher and Pupil.
2. Power to Inflict Corporal Punishment.
   (*a*) How exercised.
   (*b*) What Teacher should take into consideration
   (*c*) When being illegal as being excessive.
   (*d*) What will constitute excessive punishment.
   (*e*) Not affected because the pupil is of age.
   (*f*) Can punish even if forbidden by the parent.
3. Jurisdiction.
   (*a*) Extent of as to time and place.
   (*b*) Teacher cannot punish child for refusing to study, when excused by the parent.
4. Power of expulsion
5. Liability for failure to instruct.
6. What are reasonable rules?

The number of decisions upon the rights and liabilities of a teacher in relation to his pupil are not as numerous as the great number of persons interested and affected would warrant one in believing. For almost every one in the civilized world has at one time in his life been either a teacher or a pupil.

These controversies, relating as they do to the control, management and correction of pupils are apt to have their origin in wounded parental feeling and are frequently prosecuted with much bitterness. "It is a cause of congratulation" says Judge Lyon, "that so few of these controversies appear in the court."[1]

1. The earlier authorities as well as some of the modern ones seem to place the authority of the teacher over the pupil while it exists upon the same footing as that of a parent over his child.[2] But this seems to be too broad, and even as far back as Blackstone we are taught "that the teacher has such portion of the power of the parent committed to his charge, viz.: that of restraint and correction, as may be necessary to answer the purposes for which he was employed.[3]

[1] State *v.* Burton, S. C. Wis., 1879.
[2] Brac. Abtr. tit. assault and battery, *c*; 1 Bish. Crim. Law, § 771.
[3] 1 Black. Com. 453.

Chitty adds in a note "This power must be temperately exercised and no school master should feel himself at liberty to administer chastisement co-extensively with a parent, howsoever the infant might have appeared to have deserved it."

In *Lander* v. *Seaver*,[4] the court says: "The parent, unquestionably, is answerable only for malice or wicked motives, or an evil heart in punishing his child. This great and, to some extent, irresponsible power of control and correction, is invested in the parent by nature and necessity. It springs from the relation of parent and child. It is felt rather as a duty than as a power. This parental power is little liable to be abused, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than by reasoning. The school master has no such natural restraint. Hence he may not be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise."

In *Morrow* v. *Wood*,[5] it was claimed that the teacher had the right to prescribe the studies which the pupil should pursue, even as against the express directions of the parent. This was however denied by the court in the following language. "We do not think she had such right or authority, and we can see no necessity for clothing the teacher with such rights and arbitrary power. We do not really understand that there is any recognized principle of law, nor do we think there is any rule of morals or social usage which gives to the teacher an absolute right to prescribe and dictate what studies a child shall pursue, regardless of the wishes of the parent, and, as incident to this, gives the right to enforce obedience even as against the orders of the parent. From what source does the teacher derive this authority? From what maxim or rule of law of the land? Ordinarily it will be conceded the law gives the parent the exclusive right to govern and control the conduct of his minor children, and he has the right to enforce obedience to his commands by moderate and reasonable chastisement. And, furthermore, it is one of the earliest and most sacred duties taught a child to honour and obey its parents. . . . Now, we can see no reason whatever for denying to the father the right to direct what studies included in the prescribed course his child shall take."

2. *Power to Inflict Corporal Punishment.*—The authorities all concede the power of the teacher, under proper circumstances, to inflict a reasonable corporal punishment.

(*a*) In the case of *Quinn* v. *Nolan*,[6] Judge Harmon, in his charge to the jury makes use of the following language: "From the time of Solomon to the present parents have had the right, in a proper manner and to a proper degree, of inflicting corporal punishment on their children, and when a parent sends the child to a public school the teacher has the same right while the child is under his or her charge.

"It is not disputed that by the express rules of the school in question, to which rules the father assented when he sent his child there, corporal punishment was permitted in proper cases and in proper manner. The question, therefore, in this case is, not whether the defendant inflicted corporal punishment on the child, for that is admitted; but whether considering the offence of the child, if any, his age, condition and all the circumstances the defendant inflicted extreme and unnecessary punishment; because while the teacher has a right to punish, it is the right to punish only in a proper manner and to a proper degree. If the teacher goes beyond that, the act becomes unlawful and she is responsible for the consequence.

"In determining this question the jury should consider the offense, the size and apparent condition of the child, the character of the instrument of punishment used, and the testimony as to the manner in which, and the extent to which, the punishment was inflicted."

The *State* v. *Pendergrass*,[7] is an early and leading case upon this subject, and is very plain and full as to the extent of this

[4] 32 Vt. 114.
[5] S. C. Iowa, 1874; 13 Am. L. Reg. 692.
[6] 4 Cin. L. Bul. 81.
[7] 2 Dev. and Bat. 365.

power. Here it is said: "The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs, or health, or shall disfigure the child, or cause any permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which it is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child and does not injuriously affect his future welfare. . . . When the correction administered is not in itself immoderate, and not therefore beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it was administered. Within the sphere of his authority the master is the judge when correction is required, and of the degree of correction necessary; and like all others imparted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose."

In inflicting such punishment the teacher must exercise sound discretion and judgment, and must adopt it not only to the offence, but the offender. Horace Mann, a high authority in the matter of schools, says of corporal punishment: "It should be reserved for the baser faults. It is a coarse remedy, and should be employed upon the coarse sins of our animal nature, and when employed at all it should be administered in strong doses." Of course, the teacher in inflicting such must not exceed the bounds of moderation. No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. Each case must depend upon its own circumstances.[8]

The teacher must exercise reasonable judgment and discretion and be governed as to the mode and severity of the punishment by the nature of the offence, and the age, size and apparent powers of endurance of the pupil.[9]

(*b*) And he should also take into consideration the mental and moral qualities of the pupil, and, as indicative of these, his general behaviour in school and his attitude toward his teacher become proper subjects of consideration. And in making the chastisement the teacher may take into consideration, not merely the immediate offence which had called for the punishment, but the past offences that aggravated the present one and showed the pupil to have been habitually refractory and disobedient. Nor is it necessary that the teacher should, at the time of inflicting the punishment, remind the pupil of his past and accumulating offences. The pupil knew them well enough, without having them brought freshly to his notice.[10]

(*c*) The chastisement must not exceed the limits of moderate correction, and though courts are bound, with a view to the maintenance of necessary order and decorum in schools, to look with reasonable indulgence upon the exercise of this right, yet, whenever the correction shall appear to have been clearly excessive and cruel, it must be adjudged illegal.[11] And the master is not relieved from liability in damages for the punishment of a scholar which is clearly excessive and unnecessary by the fact that he acted in good faith and without malice, honestly thinking that the punishment was necessary, both for the discipline of the school and the welfare of the scholar.[12]

(*d*) And whether under the facts the punishment was excessive, must be left to the jury to decide.[13] But in the *State* v. *Mizner*, it was said, that "any punishment with a rod which leaves marks or welts on the person of the pupil for two months afterwards, or much less time, is immoderate and excessive, and the court would have been justified in so instructing the jury."[14] The pupil must also understand and know, or have the means of knowing, for what offence he is being punished.[15]

In criminal actions, if there is a reasonable doubt whether the punishment was excessive, the teacher should have the benefit of the doubt.[16]

[8] Reeves on Dom. Rel. 288, 534.
[9] Com. *v.* Randall, 4 Gray, 36.
[10] Sheehan *v.* Sturges, 22 Rep. 455; s. c., 16 Cin. L. Bul. 33; S. C. Conn. 1886.
[11] Hathaway *v.* Rice, 19 Vt. 102.
[12] Lander *v.* Seaver, 32 Vt. 114.
[13] Com. *v.* Randall, 4 Gray, 36.
[14] 50 Iowa, 145.
[15] *Id.*
[16] Lander *v.* Seaver, 32 Vt. 114; Whar. Crim. Law, 1259.

In an English case, where, on the boy's return to school, his master wrote to the boy's parent, proposing to beat him severely, in order to subdue his alleged obstinacy, and on receiving the father's permission, beat the boy for two hours and a half, secretly in the night and with a thick stick until he died, it was held that he was guilty of manslaughter and not murder, no malice being proven.[17]

And in the absence of all proof the law presumes that the teacher punishes his pupil for a reasonable cause and in a reasonable manner.

But this presumption, like all other legal presumptions, may be rebutted by proof.[18] And the teacher has the right to show that the chastisement was reasonable, and for misconduct in school.[19]

(*e*) And the teacher's right to chastise his pupils is not affected by the fact that the pupil, voluntarily in the school, is of lawful age and, therefore, not entitled to attend school.[20]

Upon this question the Supreme Court of Maine makes use of the following language:[21] "But it is insisted that if such is the authority over one who is in the legal contemplation a scholar, the same cannot apply to the case of one who has no right to attend the school as a pupil. It is not necessary to settle the question whether one living in the district and not being between the age of four and twenty-one years can, with propriety, require the instruction of town schools. If such does present himself as a pupil, is received and instructed by the master, he cannot claim the privilege and receive it, and at the same time be subject to none of the duties incident to a scholar. If disobedient, he is not exempt from the liability to punishment, so long as he is treated as having the character which he assumes. He cannot plead his own voluntary act, and insist that it is illegal, as an excuse for creating disturbances, and escape consequences which would attach to him either as a refractory, incorrigible scholar, or as one who persists in interrupting the ordinary business of the school."

(*f*) And the teacher has the right to punish the pupil within the bound of law, even though he has instruction from the father that the child must not be whipped.[22] He is the absolute judge of the kind of punishment to be inflicted, with the limitation that it shall be reasonable and usual, and not destructive of the relation, or subversive of the contract under which the relation exists.[23] It may be by whipping, or he may impose any reasonable restraint upon the person of the pupil which will prevent disorder in his school.[24]

But it was held that where a person took a pupil into his house, agreeing to instruct and protect him and provide for his physical wants, he was not entitled to turn him out into the street, withdraw his care, and deny him shelter and the comfort of his home, under the name or form of punishment. Such mode of punishment is neither reasonable or usual.[25]

3. *Jurisdiction.*—It is conceded that the right to punish extends to school hours, and that there seems to be no reasonable doubt that the supervision and control of the master over the pupil extends from the time he leaves home to attend school till he returns home from school.

In the recent case of *Balding* v. *State*,[*] the Court of Appeals in Texas held that a public school teacher may require the preparation of lessons at the home of the scholar: "Teachers have the same right, the same as parents, to prescribe reasonable rules for the government of children under their charge, and to enforce by moderate restraint and correction, obedience to such rules. This authority of a teacher over his pupils is not, in our opinion, necessarily limited to the time when the pupils are in the school-room, or under the actual control of the teacher. Such authority extends, we think, to the prescribing and enforcement of reasonable rules and requirements, even while the pupils are at their homes."

[17] R. *v.* Hopley, 2 F. & F. 202.

[18] State *v.* Mizner, 50 Iowa, 145; s. c., 32 Am. Rep. 128; Hathaway *v.* Rice, 19 Vt. 102.

[19] State *v.* Mizner, 45 Iowa, 248; s. c., 24 Am. Rep. 769.

[20] *Id.*

[21] Stewart *v.* Fassett, 27 Me. 266, 287.

[*] 24 Reporter, 314; 8 Cin. Law Bul. 217.

[22] State *v.* Manx. Straus, 3 Tenn. Law Rep. 19

[23] Star *v.* Litchfield, 40 Barb, 511.

[24] Fitzgerald *v.* Northcote, 4 F. & F. 656; Cooley on Torts, 171.

[25] Stare v. Litchfield, 40 Barb 541.

(*a*) In the case of *Lander* v. *Seaver*,[26] it was held that, although a school master has in general no right to punish a pupil for misconduct committed after the dismissal of the school for the day and the return of the pupil to his home, yet he may, on the return of the pupil to school, punish him for any misbehaviour, though committed out of school, which has a direct and immediate tendency to injure the school or subvert the master's authority.

In the recent case of *Derkins* v. *Goss*,[27] decided that the teacher has the right to make a rule, and to enforce it by whipping, prohibiting the boys from swearing, quarrelling or fighting on their way home from school and before the parental authority over them has been resumed.

(*b*) But it has been held that the teacher had no right to compel the pupil to study certain branches when the pupil was excused therefrom by his parent, and that if the teacher attempted to force the pupil so to do and the pupil refused and the teacher inflicted corporal punishment upon such pupil for such refusal, that the teacher would be guilty of assault and battery.[28]

And it was said that until compulsory education was established that the court was unwilling to establish the rule that a teacher may punish a pupil for not doing something the parent has requested the pupil to be excused from doing.[29]

The fact that the school was a public one, in which the studies were prescribed by statute, did not vary the general rule as to the right of the parent to direct the omission of a part of the prescribed studies.[30]

4. *Power of Expulsion.*—The teacher has not, it seems, a discretionary power of expulsion, but only for reasonable cause.[31] The power of expulsion is usually placed in the hands of the school directors or other committee in charge of the school. And the teacher generally has power only to suspend the pupil until the matter can be brought to the attention of such superior body. This is regulated by statute in some of the States.[32] For a wrongful expulsion the teacher would be liable in damages, not only to the child, but in *Roe* v. *Deming*, it was held that the father of a child, entitled to the benefits of the public school of the subdistrict of his residence, may maintain an action against the teacher of the school and the local directors of the subdistrict for damages for wrongfully expelling the child from school.[33]

This question was very thoroughly discussed in *State* v. *Burton*,[34] in which it was said that "the teacher is responsible for the discipline of his school, and for the progress, conduct and deportment of his pupils. It is his imperative duty to maintain good order and require of his pupils a faithful performance of their duties. If he fails to do so he is unfit for his position. To enable him to discharge these duties effectually he must necessarily have the power to enforce prompt obedience to his commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adeqnate remedy. In general, no doubt, the teacher should report a case of that kind to the proper board for its action in the first instance, if no delay will necessarily result from that course prejudicial to the best interests of the school. But the conduct of a recusant pupil may be such that his presence for a day or an hour may be disastrous to the discipline of the school and even to the morals of the other pupils. In such a case it seems absolutely essential to the welfare of the school that the teacher should have the power to suspend the offender at once from the privilege of the school; and he must necessarily decide for himself whether the case requires that remedy. If he suspend the pupil, he should promptly report his action to the board. It will be seldom that the teacher in charge of the school will be compelled to exercise this power, because usually he can readily communicate with

[26] 32 Vt. 114.
[27] 20 Cent. L. J., 418; S. C. Mo. 1885.
[28] Morrow *v.* Wood, 13 Am. Law Reg. (N.S.) 693.
[29] State *v.* Mizner, 50 Iowa, 145; 32 Am. Rep. 128.
[30] *Id.*
[31] Fitzgerald v. Northcote, 4 F. & F. 685.
[32] Rev. Stat. Ohio, 4014.
[33] Ohio St. 666.
[34] 18 Am. Law Reg. 233; S. C. Wis., 1879.

the district board, and obtain the direction and order of the board in the matter. But where the government of a public school is vested in a board of education with a more numerous membership than district boards, and which hold stated meetings for the transaction of business, the facilities for speedy communication with the board may be greatly decreased, and more time must usually elapse before the board can act upon the complaint of the teacher. In those schools the occasion which requires the action of the teacher in the first instance will occur more frequently than in the district schools. We conclude, therefore, that the teacher has, in a proper case, the inherent power to suspend a pupil from the privileges of the school, unless he has been deprived of the power by the affirmative action of the board."

5. *Liability for Failure to Instruct.*—Whether an action will lie against a teacher for a failure to instruct the pupil that lawfully comes to him for instruction, or whether the remedy is confined to an appeal to the governing board, Judge Cooley says,[35] in his work on Torts, is left in doubt by the authorities though he expresses the opinion that such refusal is actionable. And in *Spear* v. *Cummings*,[36] it was held that the teacher of a town school was not liable to an action by the parent for refusing to instruct his children. If an action can be maintained in such case it should be in the name of the child and for his benefit.[37]

6. *What are Reasonable Rules?*—A rule providing that pupils may be suspended from school in case they shall be absent or tardy, except for sickness or other unavoidable cause, a certain number of times, is a reasonable and proper rule for the government of the school.[38] Also to exclude a child whom it is deemed is of a licentious character and immoral, although such character is not manifested by any acts of licentiousness or immorality within the school.[39] Likewise, for acts of neglect, carelessness of posture in his seat and recitation, tricks of playfulness and inattention to study, and the regulations of the school in minor matters.[40]

A requirement by the teacher of a district that the pupils in grammar schools shall write English compositions, is a reasonable one, and if such pupil, in the absence of a request from his parent, refuse to comply with such rule he may be expelled from the school on that account.[41]

But a rule that required that no pupil should attend a social party is not reasonable, and an expulsion for such violation of such a rule would be illegal.[42]

A regulation that each scholar, when returning to school after recess, shall bring into the school-room a stick of wood for the fire, is not needful for the government of the school, and a scholar cannot be suspended for a refusal to comply with such rule.[43]

The policy of the law seems to be, as it should be, that the teacher is to be as little hampered in his school management as possible by outside persons. And it has always occurred to me that unless there has been a flagrant violation of law and a mean, malicious spirit manifested by the teacher, parents and others ought not to interfere.—*Central Law Journal.*

[35] Page 288.
[36] 23 Pick. 224.
[37] Stephenson *v.* Hall, 14 Barb. 222.
[38] Burdick *v.* Babcock, 31 Iowa, 562.
[39] Sherman *v.* The Inhabitants of Charleston, 8 Cush. 160.
[40] Hodgkin *v.* Rockport, 105 Mass. 475.
[41] Guernsey *v.* Pitkin, 32 Vt. 224.
[42] Dritt *v.* Snodgrass, 66 Mo. 286.
[43] State *v.* Board of Education, 24 Am. Law Reg. 601; S. C. Wis. 1885.

REPORTS.

ONTARIO.

IN THE FIRST DIVISION COURT OF THE COUNTY OF BRANT.

Reported for the LAW JOURNAL by W. D. Jones, Barrister-at-Law.

BRETHOUR ET AL. v. WESTBROOK.

Action against infant—What are necessaries—Goods necessary to infant—Proof of necessity on plaintiff.

The plaintiff sold to the defendant, an infant, a suit of clothing and other goods. The defendant pleaded infancy. It was shown that the suit of clothing was such as the defendant might reasonably require, but that at the time of the purchase he was well provided with clothing.

Held, that before the plaintiff can recover he must show not only that the goods sold fall under the general head of necessaries, but are necessary to the defendant, and that the onus of proving such necessity is on the plaintiff.

[Jones, Co. J.—Brantford, September 19, 1887.

James Harley, for plaintiff.

L. F. Heyd, for defendant.

JONES, Co. J.—Two questions arise in the present case: 1. Were the goods which were supplied to the defendant by the plaintiff of such a character and quality as a person in the defendant's circumstances would reasonably require? and 2. Were they necessary for or required by the defendant when ordered by him?

In the position which the defendant occupied at that time, having charge of a hotel in the city as one of the proprietors, I think the suit of clothing furnished to him by the plaintiffs was of a character and quality such as he would reasonably require. On the other question I am of the opinion that the weight of evidence goes to show that this suit of clothes was not needed by the defendant, for the reason that he was already very amply supplied with suitable clothing. While the law does not hold an infant liable for his ordinary contracts, yet an exception is made in favour of what is known in law as necessaries, and this exception is made, not for the protection of the tradesman, but for the benefit of the infant, that he may not suffer for the want of necessary clothing or other supplies that he may need. If the defendant here were already supplied with needful clothing it cannot be said that this suit was necessary. The evidence showed that this was the last of several suits that the defendant had ordered that season. And the test as to whether the articles furnished are in law necessaries is this: Were the goods supplied so necessary that the nfant must obtain them on credit rather than go without them. The authorities do not fully settle the question whether the person who supplies the goods should make enquiries to ascertain if the infant is already sufficiently supplied (see Smith on Contracts, 7th Ed. 297, and *Ryder* v. *Wombwell*, L. R. 4 Exch. 42).

I think, however, that the better opinion is, that this duty is imposed on the person who supplies the goods, otherwise he supplies them at his own risk.

I give judgment for the plaintiff for $5.55, the value of the other articles of the plaintiff's account which are not disputed, with ordinary costs of suit, except witness fees.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS DIVISION.

AYERS v. CORPORATION OF WINDSOR.

Municipal corporation—Lowering grade of street—Negligence—Absence of by-law.

In an action to recover damages for injury sustained by the plaintiff by lowering the grade of the street in front of her store, claiming that there was negligence, and also that the work was done without a by-law.

Held, that in the evidence negligence was proved; but that as the work was done without a by-law, therefore the action was maintainable.

Dougall, for the plaintiff.

M. Hugh, for the defendant.

REGINA v. ATKINSON.

Canada Temperance Act, 1878—*Police magistrate of county—Evidence of towns therein containing 5,000 population—Defendant summoned to appear before police magistrate on other findings.*

Conviction under the Canada Temperance Act. The information was laid before J. K., who described himself as "one of her Majesty's police magistrates in and for the county of Oxford," and the summons and conviction gave the like description. His commission was issued on the 12th January, 1887, and described him as police magistrate for the county of Oxford. Woodstock and Ingersoll are two towns in the county, and it was urged that the population of each is and was at the time of the complaint more than 5,000, so as to have by law each a police magistrate under R. S. O. ch. 72, sec. 1, and that it must therefore be presumed that at said time each had a police magistrate, and therefore, J. K., who was appointed police magistrate for the county, could not be such for the county which included these towns.

Held, that there was no evidence to show that Woodstock and Ingersoll contained such population, and he could not judicially say that such was the fact: that if the fact that J. K.'s describing himself as one of the police magistrates for the county showed that there was more than one police magistrate, there was nothing to show that J. K. was not appointed first, and the subsequent appointments would be the ones that were invalid.

The summons required the defendant to appear before the police magistrate "or such justice of the peace as may then be there to answer to the said information." The police magistrate who issued the summons was himself present to hear and did hear the complaint; and the defendant appeared then also and pleaded not guilty.

Held (following *Regina* v. *Durnan*), that under R. S. O. ch. 106, sec. 117, that defect did not render the conviction invalid and incurable.

Held, also that on the evidence the Canada Temperance Act was in force in the county.

McKenzie, Q.C., for the applicant.

Delamore, for the Crown.

MCDERMOTT v. REDDICK.

Mortgage—Will—Appointment—Interest.

A mortgage was made on 14th December, 1867, by T. K. to his father. The proviso for payment was that the mortgage was to be void on payment of $800 unto the executors or administrators of the mortgagee in eight equal annual instalments of $100 each, the first of such instalments to be made one year after the mortgagee's decease, upon trust to and for such executors and administrators "to pay the same to such person or persons as the said mortgagee shall by deed endorsed hereon or otherwise by deed direct and appoint, and in default of any such appointment, and so far as no such appointment shall extend in trust to pay the same to the children of the said mortgagee other than the said mortgagor in equal shares, and in case of the death of any of the said children without lawful issue, the proportion of such child to be equally divided amongst the survivors, and in case of lawful issue such issue to stand in the place of her or her parent." The mortgagee made no appointment by deed endorsed on the mortgage or otherwise by deed; but on 18th April, 1886, he made his will, wherein he states: "Understanding that the sum of $800 coming to my heirs and assigns from my estate consisting of, etc., has not been specified as to which or whom of my heirs it is payable or when it shall be paid," he directs it shall be thus disposed of, namely: to his daughters A., M. and B., each $200; to his grand-daughters A. and K., $100, and to his wife $100; and that the said sums shall be paid forthwith after his death.

Held, that the will constituted a valid appointment under the proviso in the mortgage, and that the said legatees or appointees under the said will were entitled to the said sums devised to them; but that the time for the payment of the money must be in accordance with the terms of the mortgage.

The mortgage was a printed statutory form. The proviso is for payment of the $800, the printed words *with* interest being struck out; but the mortgagor covenants to pay the mortgage money and interest and observe the above proviso; and these are the provisoes that the mortgagee may distrain for arrears

of interest: that in default of the payment of the interest thereby secured the principal thereby secured shall become payable; and that until in payment the mortgagor shall have quiet possession.

Held, that no interest was payable until after each instalment of principal becomes due if the payment thereof be then delayed.

F. S. Wallbridge, for the plaintiff.

F. E. Reddick, for defendants.

John Hoskin, Q.C., for the infants.

PRACTICE.

Dalton, Q.C.] [Sept. 16.

WARD v. JACKSON.

Notice of trial—Remanet from assizes—Chancery Division sittings.

When a case has been made a *remanet* at the assizes, a notice of trial for the Chancery Division sittings is irregular and will be set aside.

Aylesworth, for the defendant.

J. M. Clark, for the plaintiff.

Wilson, C.J.] [September 16.

HILLYARD v. SWAN.

Judgment—Setting aside—Execution.

The plaintiffs signed judgment on default of appearance in an action for a money demand, and the defendant was afterwards, upon application to a local judge, let in to defend upon the merits upon certain conditions, one of which was "the judgment and execution (*fi. fa.* goods) now in force to stand as security to the plaintiffs, unless and until the defendant pays into court the amount of the plaintiff's claim, or gives security therefor." The defendant did not pay into court or give security. The action was tried and a verdict given for the plaintiffs, subject to a reference to ascertain the proper amount due to the plaintiffs; and the referee found a less amount due than that for which judgment had originally been entered. After verdict, and before the finding of the referee, the plaintiffs issued and delivered to the sheriff a *fi. fa.* against the lands of the defendant on the original judgment.

Semble, the original judgment could not stand when the case was reopened and the defendant let in to defend. But as the parties had treated the judgment as standing,

Held, that it and the *fi. fa.* goods should be reduced to the sum found by the referee, instead of entering a new judgment; but that the issue of the writ of *fi. fa.* lands was quite unwarranted, and the writ should be set aside.

Walter Read, for the defendant.

Shepley, for the plaintiff.

Boyd, C.] [September 26.

PLATT v. GRAND TRUNK RAILWAY CO.

Costs—Taxation—Appeal—Copies of opinions of judges—Objections.

Upon an appeal to a judge in chambers from the taxation of costs by a local taxing officer where the bill was referred to one of the taxing officers at Toronto, as upon a revision,

Held, that there should be no costs of the appeal and revision unless success is substantially with one party or the other.

Charges for procuring copies of opinions of judges in another action for the instruction of counsel, should not be taxed as between party and party.

An appeal should not be allowed as to any item not included in the objections put in to the taxation.

T. Langton, for the plaintiff.

H. Cassels, for the defendants.

Boyd, C.] [September 28.

WARNOCK v. PRIEUR.

Foreclosure—Opening — Irregularities — Lunatic defendant—Appointment of guardian ad litem—Chambers judgment—Rule 69—G. O. O. Chy. 434, 645.

In a mortgage action for foreclosure a local Master appointed the official guardian to represent a lunatic defendant as guardian *ad litem*, without notice being served as directed by Rule 69. The guardian made full enquiries, communicated with the relatives of the lunatic, and put in the usual formal defence on behalf of the lunatic; and a judgment of fo-

closure was obtained in chambers against all the defendants, including infants and the lunatic defendant.

Held, that the order appointing the guardian was an erroneous one, for which there was no proper foundation; not a mere irregularity which could be held to be waived by the subsequent steps taken to protect the lunatic's rights.

Held, also, that the term "adult" in G. O. Chy. 645, does not include a lunatic or person of unsound mind; and therefore that a judgment against a lunatic could not be obtained in chambers under G. O. Chy. 434.

The judgment of foreclosure was set aside.

Foy, Q.C., and *E. Taylour English*, for the defendants.

J. Maclennan, Q.C., for the plaintiff.

Boyd, C.] [September 28.

PIERCE v. PALMER.

Statement of claim, delivery of—Irregularity—Waiver.

Upon the defendant's application to dismiss the action for want of prosecution, an order was made on the 6th May that upon payment by the plaintiff of $20 costs within eighteen days, and upon his delivering his statement of claim within the same time, the defendant's application was dismissed. On the 26th May after the expiry of the eighteen days, the plaintiff filed his statement of claim, delivered a copy to the defendant's solicitors, and tendered them $20, which they refused to accept. They also declined to admit service of the statement of claim but retained it in their possession. On the 3rd June an order was made extending for one week the time for filing and delivering the statement of claim and paying the $20. This order did not provide that the statement of claim already delivered should stand. Within the week the plaintiff paid the $20, and nine days afterwards signed judgment against the defendant for default of defence, upon the statement of claim delivered on the 26th May.

Held, affirming the decision of the Master in Chambers, that the plaintiff was wrong in filing and serving his statement of claim before paying the costs; but this irregularity was waived and the service became effective when the costs were afterwards received, they being paid under the order of the 3rd June.

Hoyles, for the plaintiff.

C. J. Holman, for the defendant.

Proudfoot, J.] [October 3.

REID v. MURPHY.

Interpleader—Sale of goods—Sheriff's charges.

By an order made upon an interpleader application a sheriff was directed to sell the goods in question and pay the proceeds into court, less his possession money and expenses of seizure and sale. The sheriff did so; the interpleader issue was tried and resulted in favour of the claimant. An order was then made in chambers directing that the sheriff should pay into court the amount retained by him under the previous order, and that the execution creditor should pay the sheriff his proper charges for possession money, etc.

Held, that this was the proper order to make.

Bicknell, for the sheriff.

Hoyles, for the claimant.

Proudfoot, J.] [October 4.

SNOWDEN v. HUNTINGTON.

Costs—Taxation—Local taxing officer—Rule 447.

Rule 447 applies to a taxation of costs conducted by a local taxing officer under the powers given him by 48 Vict. c. 13, s. 22, and an appeal from such taxation does not lie, unless objections are carried in before the officer as required by that rule.

Quay v. *Quay*, 11 P. R. 258, followed.

Hoyles, for the plaintiff.

W. M. Douglas, for the defendant Morris.

Ferguson, J.] [October 17.

FOGG v. FOGG.

Venue—Alimony action – Preponderance of convenience.

The venue was changed from Whitby to Toronto in an action of alimony upon the application of the defendant where there was not sufficient difference in expense to warrant the change in an ordinary case, because of the rule in alimony cases which imposes on the defendant the burden of advancing and paying all the disbursements on both sides in any event. The circumstance that two of the defendant's witnesses, who reside in Toronto, were public officers, and that their absence would be a public inconvenience was also considered in determining the preponderance of convenience.

Chapple, for the plaintiff.

H. Cassels, for the defendant.

Ferguson, J.] [October 19.

IN RE GABOURIE, CASEY v. GABOURIE.

Leave to appeal—Extension of time—Excuse for delay—Requirement of justice.

Two of the defendants (legatees) in an administration suit, appealed from the report of a master, and thereby succeeded in charging the plaintiff, an executor, with their shares of a sum of $4,000 which the executor had lost to the estate. The other defendants did not appeal, and as to them the report became absolute on the 24th March, 1887. Three of these defendants in September, 1887, after the success of their co-defendants' appeal was established, moved for leave to appeal and to extend the time, their excuse for the delay being that they had supposed the appeal of their co-defendants would enure to their benefit.

Held, that justice required that the time for appeal should be extended and these defendants let in to appeal, upon their placing the executor in as good a position as he would have occupied if they had appealed within the time allowed, notwithstanding that the $4,000 was lost to the estate by an innocent mistake of the executor, that he had acted as he did by reason of the instructions given him by the testator, and his acting and taking advice according to the instructions had led directly to the mistake.

Langdon v. *Robertson*, 12 P. R. 139, followed.

Birls v. *Beatty*, 6 Madd. 90, distinguished.

J. Maclennan, Q.C., for the plaintiff.

Hoyles, for the defendants.

Ferguson, J.] [October 19.

MCKAY v. KEEFER.

Partition—Reference—Fees to experts—Chy. G. O. 240.

In the cause of a reference to make a partition of lands, a master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared.

Held, that the course adopted by the master was a reasonable one, that he had the power under Chy. G. O. 240 to take such course, and that the fees paid to the skilled persons by the defendant should be taxed to him.

W. H. Blake, for the defendant.

Middleton, contra.

Galt, J.] [October 19.

MCMASTER v. MASON.

Discovery—Examination of witness—Production of documents—Fraud—Rules 109, 285.

In an action of ejectment, where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase which he had entered in his father's books, an order was made for examination of the father and production of his books for the purpose of discovery before the trial.

Held, that the father might have been made a party under rule 109, on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son, and such being the case there was no doubt of his liability to be examined under rule 285.

Walter Macdonald, for the plaintiffs.

F. E. Hodgins, for the defendant.

LAW STUDENTS' DEPARTMENT.

LAW SOCIETY EXAMINATION DATES.

Owing to changes which have been made since our sheet almanac for 1887 was published it is desirable to give our student friends definite and accurate information as to various matters in which they are interested. The following has been kindly prepared for us by Mr. Esten, Secretary of the Law Society:

HILARY TERM, 1888.

COMMENCES 6TH FEBRUARY.

Last day for Call Notices for H. T., 10th December, 1887.
Last day for Primary Notices, 7th January, 1888.
Primary Examination, 17th January.
Graduates and Matriculants, 19th January.
Last day for filing papers and fees (Final Examinations), 21st January.
First Intermediate Examination, 24th January.
Second Intermediate Examination, 26th January.
Solicitor Examination, 31st January.
Barrister Examination, 1st February.

EASTER TERM.

COMMENCES 21ST MAY.

Last day for Call Notices for E. T., 18th February.
Last day for Primary Notices, 21st April.
Primary Examination, 1st May.
Graduates and Matriculants, 3rd May.
Last day for filing papers and fees (Final Examination), 5th May.
First Intermediate Examination, 8th May.
Second Intermediate Examination, 10th May.
Solicitor Examination, 15th May.
Barrister Examination, 16th May.

TRINITY TERM.

COMMENCES 3RD SEPTEMBER.

Last day for Call Notices for T. T., 9th June.
Last day for Primary Notices, 4th August.
Primary Examination, 14th August.
Graduates and Matriculants, 16th August.
Last day for filing papers and fees (Final Examination), 18th August.
First Intermediate Examination, 21st August.
Second Intermediate Examination, 23rd August.
Solicitor Examination, 28th August.
Barrister Examination, 29th August.

MICHAELMAS TERM.

COMMENCES 19TH NOVEMBER.

Last day for Call Notices for M. T., 15th September.
Last day for Primary Notices, 20th October.
Primary Examination, 30th October.
Graduates and Matriculants, 1st November.
Last day for filing papers and fees (for Final Examination), 3rd November.
First Intermediate Examination, 6th November.
Second Intermediate Examination, 8th November
Solicitor Examination, 13th November.
Barrister Examination, 14th November.

SUPREME COURT OF CANADA.

General Order No. 83.

Whereas, by "The Supreme and Exchequer Courts Act," sec. 109, as amended by chap. 16 of he Act passed in the 51st year of Her Majesty's reign intituled "An Act to amend 'The Supreme and Exchequer Courts Act,' and to make better provision for the trial of claims against the Crown," it is provided that the judges of the Supreme Court, or any five of them, may, from time to time, make general rules and orders for certain purposes therein mentioned, and among others for empowering the registrar to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the court, was at the time of the last mentioned act, or might be thereafter, done, transacted, or exercised by a judge of the court sitting in chambers, and as might be specified in such rule or order. It is therefore ordered:—

1. That the registrar of the Supreme Court of Canada be and is hereby empowered and required to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the court, was at the time of the passing of the said last mentioned Act, and is now, or may be hereafter, done, transacted, or exercised by a judge of the said court sitting in chambers, except in matters relating to:—

(*a*) Granting writs of *habeas corpus* and adjudicating upon the return thereof.

(*b*) Granting writs of *certiorari*.

SUPREME COURT OF CANADA.

2. In case any matter shall appear to the said registrar to be proper for the decision of a judge, the registrar may refer the same to a judge, and the judge may either dispose of the matter, or refer the same back to the registrar with such directions as he may think fit.

3. Every order or decision made or given by the said registrar sitting in chambers shall be valid and binding on all parties concerned, as if the same had been made or given by a judge sitting in chambers.

4. All orders made by the registrar sitting in chambers are to be signed by the registrar.

5. Any person affected by any order or decision of the registrar may appeal therefrom to a judge of the Supreme Court in chambers.

(*a*) Such appeal shall be by motion on notice setting forth the grounds of objection and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a judge of the said court or the registrar.

(*b*) The motion shall be made on the Monday appointed by the notice of motion, which shall be the first Monday after the expiry of the delays provided for by the foregoing sub-section, or so soon thereafter as the same can be heard by a judge, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the registrar's office.

6. For the transaction of business under these rules, the registrar, unless absent from the city, or prevented by illness or other necessary cause, shall shall sit every juridical day, except during the vacations of the Court, at 11 a.m., or such other hour as he may specify from time to time by notice posted in his office.

W. J. RITCHIE, C.J.
S. H. STRONG, J.
T. FOURNIER, J.
W. A. HENRY, J.
H. E. TASCHEREAU, S.C.

October 17th, 1887.

LITTELL'S LIVING AGE. The numbers of *The Living Age* for the weeks ending October 15th and 22nd, contain "A Great Lesson," by the Duke of Argyll, *Nineteenth Century;* "Masaniello," *Temple Bar;* "Donatello, and the Unveiling of the Façade of the Duomo at Florence," *National Review;* "Realism and Idealism," *Fortnightly;* "The Last Day of Windsor Forest," *National Review;* "Some Clerical Reminiscences," *Temple Bar;* "A Carthusian Monastery near Meran," *Spectator;* "The Ubiquity of the Jewish Race," *Jewish World;* "The Country Parson as he was and as he is," *Blackwood;* "The Present State of the Novel," *Fortnightly;* "Mr. Twining's Letters," *Temple Bar;* "The Story of Zebehr, as told by Himself," *Contemporary;* "Morphinomania," by Dr. Seymour J. Sharkey, *Nineteenth Century:* "Linnæus," *All the Year Round;* "Contemporary Despatches, by a Foreign Minister during the Early Years of Charles I.," *St. James's Gazette:* "Wordsworth's Grave," *National Review;* with instalments of "Major and Minor," by W. E. Norris; "A Secret Inheritance," by B. L. Farjeon; "Major Lawrence, F.L.S.," and "Richard Cable, the Lightshipman," poetry and miscellany.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10 50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

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OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office

or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in con nection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts, Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

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Canada Law Journal.

VOL. XXIII. NOVEMBER 15, 1887. No. 20.

DIARY FOR NOVEMBER.

16. Wed....Appointment of election judges on rota.
17. Thur...Lord Chancellor Erskine died 1823, æt. 73.
20. Sun.....*24th Sunday after Trinity.*
21. Mon....Michaelmas sittings begin. J. Elmsley, 2nd C. J. of Q. B. 1796.
27. Sun.....*Advent Sunday.*
30. Wed....Moss, J. A., appointed C. J. of Appeal, 1877,

TORONTO, NOVEMBER 15, 1887.

"ONE by one the leaves fall," but death has been of late years more than ordinarily busy in the ranks of our judges. Only a few months ago we had to chronicle the death of Sir M. C. Cameron, then his old friend Chief Justice Wallbridge dropped off, and now we have to chronicle the sudden death of Mr. Justice O'Connor, of the Queen's Bench, on the 3rd inst, while holding the assizes at Cobourg.

A REPORT of the case of *Shaw* v. *Northern Railway Co.*, which will be found in another place, has not appeared in the regular series, inasmuch, we presume, as the judges of the Court of Appeal gave no judgment other than merely to affirm without comment the judgment of the learned judge of the County Court of Simcoe. It does not, of course, follow that the Appellate Court adopts the reasons, but merely the results arrived at in the judgment of the court below. But in this case the argument of the County Judge is so satisfactory that we may assume it commended itself to the judges in the court above.

THE following clause is to be found in "An Act respecting domestic and other animals," now in force in the Province of Manitoba, and was enacted with a view of striking terror into the breasts of certain evil doers who had the "pernicious" habit of "catching animals at large and using them without the owner's consent." It reads as follows:

"3. No person catching or detaining, or causing to be caught or detained, any animal that has been advertised by the owner, or by any person on his behalf, as lost or strayed shall be liable to fine or imprisonment under this Act, unless he shall establish to the satisfaction of the court in which the charge is made, that he took immediate and proper measures to inform the owner of the animal, or his agent, of its having been caught."

This is lovely—comment would be barbarous.

SINCE our last issue the report of the Board of Trade of the city of Toronto in the matter of J. B. McKay & Co. has been published in the daily papers, and amongst others, in the Toronto *Mail* of the 26th inst. We call attention to this report on account of the admirably judicial way in which the council of the Board of Trade have handled the unpleasant matter before them, and also on account of the fearless and conscientious manner in which they have in the conclusion to which they arrived enforced honourable dealing among business men within their control. Who the actual author of the report was we have no means of knowing, but all we can say is that he has a judicial mind, and has admirably expressed the sound views entertained by the council. We think also that a good moral may be derived from the report by our own Law Society, who, it is to be hoped, will always enforce with equal firmness any crooked or

unprofessional dealings among members of the profession which may be brought to their notice. We publish the report referred to in full in another place (p. 395 *infra*).

THE precise difference between a rule of law, and a rule of construction was very clearly and neatly stated by Fry, L.J., in the recent case of *Re Coward, Coward* v. *Larkman*, 57 L. T. N. S., 285. In one sense a rule of construction may be said to be a rule of law, inasmuch as it is a rule laid down by the law for the construction of written instruments, but the terms, "rule of law," and "rule of construction," have acquired a definite technical meaning, and are intended to express two radically different ideas.

According to Fry, L.J., "rules of construction" and rules of law differ in this respect—the one being a rule which points out what a court shall do in the absence of any express or implied intention to the contrary; the other is one which takes effect when certain conditions are found, although the parties to the instrument under consideration may have indicated an intention to the contrary. It will thus be seen that a "rule of construction" is a flexible rule yielding to a contrary intention, and that a "rule of law" on the other hand is inflexible, and its application is unaffected by any intention of the parties.

This distinction, when clearly kept in mind, will serve as a safeguard against any confusion of thought as to the relative nature of "rules of law" and "rules of construction."

JUDICIAL APPOINTMENTS.

OWING to the retirement of Sir Adam Wilson to his well earned repose, the presidency of the High Court of Justice is now transferred to the Chancellor as the senior chief, and as he is still a young man, in all probability, it is likely long to remain there; unless, indeed, he receive promotion to a higher court.

WE heartily congratulate Mr. Justice Taylor upon his appointment to the Chief Justiceship of Manitoba. He has won the position fairly, and none will grudge him the honour, except apparently some of the race who, holding too much the balance of power politically, think that every plum should fall into their mouths. The Government has made a wise selection. The learned Chief Justice whilst in Ontario was a great success as Master in Ordinary of the Court of Chancery, and also made some valuable additions to our legal literature. He has given, we understand, great satisfaction to the profession and the public as a judge in Manitoba, and will, we are satisfied, be as useful in his new position as he has been in the more subordinate ones where he acquired his judicial training.

IT is also here in order to congratulate Mr. Justice Galt and Mr. Justice Armour upon their promotion, the former to the Chief Justiceship of the Common Pleas Division, rendered vacant by the untimely death of Chief Justice Cameron, and the latter to the seat lately resigned by Sir Adam Wilson as Chief Justice of the Queen's Bench Division. The friends of the genial Chief Justice of the Common Pleas are legion. In the natural course of things it is not unlikely that he may soon seek relief from the arduous duties which devolve upon our judges. But

whether on or off the Bench may he long live to enjoy the honour conferred upon him. The appointment of Mr. Justice Armour is a fitting recognition of his great ability, and as such will be recognized by all. He has in all human probability a long career of usefulness before him.

NOTHING definite has transpired as to the persons likely to be elected to fill the vacancies on the Bench in this Province. It is amusing to read the strings of names which are from time to time put forth by the newspapers as possible appointees. The more so as these lists seem usually framed on the principle of selecting the most unlikely persons for the distinction. In very few have we observed the names of men whose long standing and reputation at the Bar naturally mark them as men on whom the choice of the profession would almost instinctively fall. For instance, Mr. Christopher Robinson, Q.C., Mr. Maclennan, Q.C., Mr. Dalton McCarthy, Q.C., Mr. B. B. Osler, Q.C., Mr. Hector Cameron, Q.C., Mr. Moss, Q.C., are each and all among the foremost from whom one would expect judicial appointments to be made. The fact that our contemporaries almost invariably hit upon the names of men of inferior standing at the Bar, as the persons most likely to be appointed, arises from a general conviction that the greater stars in the firmament look upon the judicial office as either unworthy of their acceptance, or as involving too great a pecuniary sacrifice. If this is the reason, what a sad commentary it is on the effect of our parsimonious conduct as a people, in the matter of judicial salaries? The fact that it seems to be agreed by almost universal consent, that we must look to the second rank of the Bar from which to recruit the Bench, is a misfortune so great that no sensible person can contemplate it without grave apprehension for the future.

MR. JUSTICE O'CONNOR.

THE Hon. Mr. Justice O'Connor died at Cobourg on the 3rd of November inst., aged 62 years. He was born in Boston, U.S., in January, 1824, his father and mother having emigrated from Kerry, Ireland, to Boston the previous year. He, with his parents, subsequently removed to the county of Essex, in Ontario, where he received his education. When about twenty years of age, while working on his father's farm on a cold winter day, a falling tree pinned him down and jammed one of his legs between the falling tree and a stump, and this accident resulted in the loss of the limb. But for this, he might still be following the plough, but as it was, his attention was directed to the study of the law, and he was called to the Bar in Hilary Term, 1854. He was also admitted to practise law in the State of Michigan, and he was an instance of a person who could be an American citizen and a British citizen at the same time. Born of British parents he could claim, and was recognized as a British subject, and being born in Boston was a native-born American citizen. This point was tested in an election trial between him and William McGregor in the year 1874. His legal attainments soon caused him to occupy a leading position at the Bar in the Western Peninsula. He held at different times the position of Reeve of Windsor and the Wardenship of the county.

In 1863 Mr. O'Connor entered Parliament, and in 1872 joined the Administration of Sir John Macdonald as a representative of the Irish Roman Catholic inhabitants of Ontario (though why they

should have a representative any more than any other class we are at a loss to see). He there held the different positions of President of the Council, Minister of Inland Revenue and Postmaster-General.

He was created a Q.C. in 1873. On the 17th September, 1884, he was appointed one of the Judges of the Queen's Bench Division on the elevation of Sir Matthew Crooks Cameron to the Chief Justiceship of the Common Pleas Division.

As Mr. O'Connor had for some time previously to his appointment to the Bench, devoted his time chiefly to politics, his labours as a Judge were specially arduous, but he never flinched from his work and he died in harness. Contrary to the advice of his physician, he went on the Autumn Circuit, realizing that the work had to be performed and the persons to do it had been diminished by death and illness. He went to Cobourg to hold the assizes, but not being able to perform his duties Judge Benson acted for him, and while still there he was attacked by an illness which caused his death in a few hours.

The Hon. Mr. Justice Rose referred to the death at the opening of his court the following day, in the following words:

"Before entering upon the business of the Court, I desire to refer to the very sad and sudden death of the Hon. Mr. Justice O'Connor. Thus another of our judicial brethren has been removed from our side. Since my appointment, four years ago this present month, four of the judges of the Superior Court of this Province have been removed by death—Chief Justice Spragge, Mr. Justice Morrison, Chief Justice Sir Matthew Crooks Cameron and Mr. Justice O'Connor, an average of one a year. Truly life is but a span, and very soon the night cometh wherein no man can work. Our deceased brother no doubt, like the rest of us, had his faults, but in the short period he was amongst us as a brother Judge we learned that he was a man of kind heart, clear head, broad common sense, fair minded, impartial, with a strong will, always determined to do his duty as he understood it and to administer justice without fear, favour or affection. Taken from the midst of political life, not fresh from the Bar, he was of course not as familiar with the recent decisions as otherwise he would have been. This made his labour more arduous, and, with the weight of advancing years and at times much physical infirmity, caused his burden to be greater than appeared to most. His indomitable pluck and perseverance enabled him to overcome many difficulties, and he was ever ready not only to perform the work which in ordinary course fell to his lot, but also to volunteer assistance when required to relieve others who might be unduly pressed. Ever kind and cheerful, he brought to our councils no unpleasant word, no disturbing element. In sadness we turn away from his vacant seat, and join with many others in saying, 'Requiescat in pace.'"

REPORTS.

ONTARIO.

IN THE COURT OF APPEAL.

APPEAL FROM THE COUNTY COURT OF THE COUNTY OF SIMCOE.

[Reported for the CANADA LAW JOURNAL.]

SHAW V. NORTHERN AND NORTHWESTERN RAILWAY COMPANY.

Action against railway company—Right to flood land to obtain water for engines—Damages—Injunction.

The defendants' road crossed a stream on plaintiff's land which they dammed back to get head enough to work a turbine wheel to pump the water into a tank for supplying their engines. This caused an overflow on plaintiff's land for which he brought this action. The jury having assessed damages, a verdict was entered for the plaintiff. Against this defendants moved, contending, amongst other things, that under the statutes cited they had the right to take the water in the way they did; and that in any case, plaintiff's remedy was by arbitration.

Held, that though defendants might have the right to use the water of the stream, they could not dam it back (and so flood the plaintiff's land), so as to work their turbine wheel, when they could get a sufficient supply by using a pump worked by steam or by hand, the using of which would not overflow plaintiff's land.

Held, also, that plaintiff's remedy was by action, and not arbitration, and that he was entitled to an order for the removal of the dam, and an injunction against its being built.

The facts of the case sufficiently appear in the judgment of the court below by

ARDAGH, Co.J.—This is an action of trespass for flooding the plaintiff's land, and was tried by a jury at the June sittings of this court.

The evidence showed that the plaintiff, in February, 1884, purchased the land in question subject to the right of way previously acquired by the defendants from a prior owner. At the time of the purchase by plaintiff the defendants had constructed and were using their line of railway, trains running regularly over it. They had also, in 1881 or 1882 (some years after the railway was constructed), built a dam on a small stream which ran through plaintiff's lot—that mentioned in the pleadings—for the purpose of gaining a supply of water for the use of their engines. This dam was partly on plaintiff's land—more than half of it, he said in his evidence (though defendants' engineer said it was all on their road),—and is about four feet high. A year or two ago the defendants raised this dam by laying down a 2-inch plank. The effect of this was to raise the water still higher on plaintiff's lot, and to double the area of overflowed land. This overflowed land lay to the north of the defendants' road, and is nearly an acre in extent. Most of this acre is overflowed, and all of it rendered useless by the water being backed. The plaintiff also complained that the defendants had cut a sort of tail race alongside of the stream on the south side of the railway, 120 feet long and 12 or 14 feet wide, and 3½ or 4 feet deep in some places, for the purpose of carrying off the waste water, and this made it very dangerous for his cattle, as likely to fall in. The object of making the dam was to get enough water to run a turbine wheel, which pumped the water up into a large tank, thus doing away with the necessity of using steam or hand-power for that purpose.

Plaintiff also complained of a small portion of land on the opposite side of the stream having been washed out by this dam breaking away. The area of this is small, but the tail-race and the land between it and the stream (rendered useless) is about one-quarter of an acre.

Previous to action brought the defendants had offered plaintiff $100 for the land flooded, said by them to be about one-half an acre.

The evidence of the value of the land, and of the damage done by the defendants was sufficient to support the verdict for the plaintiff, which is not complained of on that ground.

For the defence, Mr. Holgate, defendants' chief engineer, was called. He stated when and how this dam came to be constructed by defendants. He said that it was necessary to work a turbine wheel to pump the water, and that no unnecessary damage was done in carrying this out. That a tank was placed at this particular point (Hawkstone Station) on account of the facilities of the water. If this stream had not been there they would have put a tank at Oro Station, about half way between the Allandale and Orillia tanks. He also said that they had tanks in other places where there were no streams.

Mr. Reeve, Q.C., for the defendants, objected to the case going to the jury, on the ground that no action would lie against the company, as the act complained of was not a wrongful act, having been done by them under the powers conferred by the statute, so that the plaintiff's remedy was only by arbitration. He also objected on the ground that

the plaintiff was not entitled to any compensation for what was done by the defendants before the plaintiff became the owner of the land, as it must be presumed that what was done was done with his (plaintiff's vendor's) consent, and that in any case plaintiff could only recover damages for the six months prior to the bringing of the action.

Mr. Strathy, Q.C., for the plaintiff, asked for an injunction against the defendants (that having been prayed for in the statement of claim) to prevent them continuing the flooding, and for an order compelling them to remove the dam.

The jury were directed to assess damages:

1st. For the two and a half years the plaintiff has been in possession as owner, for which they found $50.

2nd. For the six months before the action was brought. For this they found $20.

3rd. The total damage to the plaintiff in case the defendants did not remove the dam. For this they allowed $125, and for this latter sum the verdict was entered.

The defendants now move absolute an order *nisi* to set aside this verdict, and to enter one for the defendants or a non-suit.

The plaintiff also took out an order *nisi* to enter a verdict for the $50, with an injunction and order as prayed for in plaintiff's claim, and both motions were argued together.

Mr. Boulton, Q.C., for defendants:—

When the dam was built the plaintiff was not the owner, nor till two years afterwards. Also that there was no dissent by the other owner, and that the plaintiff bought with the dam on the place, and so has no right now to complain.

The defendants, in erecting this dam, were acting within their powers, and so cannot be treated as trespassers, arbitration under the statute being the proper course in such a case.

Even if this action is maintainable, plaintiff ought not to recover for more damages than have accrued during the six months before the commencement of the action.

He referred to the Consolidated Railway Act, 42 Vict. chap. 9, sec. 9, ss. 38 and 39, and also to the Northern Railway Company Act, 1875, 38 Vict. chap. 65, sec. 28.

By the last mentioned Act this company are empowered to make use for the purposes of its railway of the water of any stream or water-course over or near which its railway passes, doing, however, no unnecessary damage thereto and not impairing the usefulness of such stream or water-course.

Mr. Strathy, in reply, contended that any powers the defendant undertakes to exercise must be only such as the statute confers on them; that the statute cited gave them power to use water, and not to flood land, and therefore, the injury complained of is not one which should be the subject of arbitration. That the plaintiff took this land subject to the right of way only (as he swore at the trial) and that only a right of way was reserved in his deed. He also argued that the words "injury sustained by reason of the railway," in section 27 of the Act (where the six months' limitation is spoken of) refer to what was done under the authority of and in pursuance of the Act (see the closing words of the 1st section), and therefore cannot be held to refer to a case of this sort, where the injury was not so done.

The questions to be considered are, it seems to me, these:—1st. Has plaintiff any right of action at all? 2nd. Was the construction of this dam something which the defendant had the right to do under either of the Acts cited? If not (3rd), is the plaintiff to be restricted to damages for the injury complained of for the six months preceding the action being brought? 4th. Is this a proper case for the order and injunction asked for?

I must say I do not see why the plaintiff has not a right of action, apart, of course, from the question of arbitration, which will be considered presently. It is true that the dam in question was erected before the plaintiff bought the land, but he says he bought subject only to the defendants' right of way, and that that was the only thing reserved in the deed from his grantor. This dam had been erected long after the defendants had bought this right of way, and there is neither evidence nor inference that there had ever been any compensation to plaintiff's grantor on account of it. Could his grantor have maintained an action for it? If so, why not he? In the case of *Wallace* v. *Grand Trunk Railway*, 16 U. C. R. 551, the plaintiff's grantor had been paid by the defendant, not only for the land, but for all damage done, and it was said that as his grantor could not have maintained an action for it, so the plaintiff (his vendee) could not.

If then this injury was done by the erection of the dam without the consent of the plaintiff's grantor (for in the absence of some evidence to the contrary this might fairly be assumed, and also that it was done without his knowledge) why should not the defendants pay this plaintiff for it? But apart from that, it was in evidence that the area overflowed before the plaintiff bought, was doubled by the addition (small though it was) made to the height of the dam by the defendants, after the plaintiff bought the land, and that the wash-out

caused by the dam breaking was made during plaintiff's ownership.

Of course, the plaintiff would have had his action at common law for the injury done by the defendants, were it not for the protection afforded them by the Railway Act cited. The powers given by these statutes are very ample, but they must not be construed to give more than they actually do, and I think the wording of them should be strictly followed, so as not to take away plaintiff's common law right. They would no doubt have the right to use the water of this stream under the limitations given in their special Act, but, if they could use it without damaging the plaintiff, that is no reason why they should overflow his land so as to save themselves expense; without any dam at all they could have pumped up the water into the tank either by hand or steam, as they do and have to do at other places. It is not necessary for the maintenance of the railway that they should construct a turbine wheel to pump up the water and to flood the plaintiff's land. If they can erect the dam they can also raise it high enough for a ten foot wheel, and so do all the flooding they like.

The general Act speaks of their purchasing the water required by them. Must this involve the erection of a mill pond where the water can be obtained in some other way, though it may be at greater expense to them?

In *Pendergast* v. *Grand Trunk Railway Co.*, 25 U. C. R. 193, the defendants had set fire to some refuse on their railway (which they had a right to do), and it broke out in some way unknown and spread to the plaintiff's land adjoining, and it was held that he could not be deprived of his common law right to an action for the damage done.

In *Cameron* v. *Grand Trunk Railway Co.*, 14 U. C. R. 612, it was held that the injury complained of should have been the subject of arbitration, inasmuch as the embankment, the cause of the injury, was erected during the construction of the railway, and there was no complaint in the declaration of "want of care or skill in the manner of performing the work," but that as it was a continuing injury the plaintiff would not be limited to the six months.

In *Wallace* v. *Grand Trunk Railway Co.* (supra.) there was no natural outflow for the water causing the plaintiff injury through the ravine spoken of, and nothing was done but the making of the road. There was no allegation of improper construction. In such a case arbitration was held to be the proper course.

In *Knapp* v. *Great Western Railway Co.*, 6 U. C. C. P. page 187, the injury complained of was done at the time of the construction of the railway and as a necessary consequence thereof, and, it was said, compensation must therefore be assumed to have been made and paid to the plaintiff. But plaintiff did not complain of the construction of the road, but of a consequential injury arising from time to time. The court assumed that compensation had been agreed upon and paid. Two years had elapsed between the construction of the road and the injury complained of. While the damage claimed for was the result of the original construction of the road, the nature of the injury must have been then perfectly apparent, and the claim must be assumed to have been advanced, because the acts which formed the foundation of the claim were then completely done. DRAPER, C.J., says:—"I think that when a damage is the direct consequence of an act authorized by the statute on compensation being made, and a subsequent claim for that damage as a continuing damage is set up, in a form which must be taken to admit that a compensation for the act itself had been made, such subsequent claim is barred. In this case the damages are attributed to the construction of the railway upon and immediately adjacent to the plaintiff's land, and therefore might have been considered and their value estimated and determined when defendants made compensation for the rights they acquired from the plaintiff."

This case goes to show that the court will only go the length of assuming compensation to have been made where it is a fair presumption, arising from the work causing the injury having been done at the construction of the road, or else as being a natural consequence of its construction.

In *McGillivray* v. *Grand Trunk Railway Co.*, 25 U. C. R. 69, an embankment was constructed by the defendants without a proper culvert, so causing the injury complained of. It was held that an action would lie, but the plaintiff was limited to the damages arising during the six months preceding the action.

In *L'Espérance* v. *Great Western Railway Co.*, 14 U. C. R. 173, the action was held not maintainable, as the injury done was attributable to the mere construction of the railway, which should have been taken into consideration at the time of the contract or at the reference, if the parties had disagreed.

In *Patterson* v. *Great Western Railway Co.*, 8 U. C. C. P. 89, the injury complained of was for diverting water, which used to flow on to plaintiff's land. It was held that the injury was permanent at once, and therefore the action should have been brought within six months.

All these last mentioned cases are alluded to in that of *Vanhorn* v. *Grand Trunk Railway Co.*, 18

U. C. R. 356. That was an action for causing the overflow of plaintiff's land by obstructing a stream. *Held*, maintainable and not to be a case for arbitration. The railway was built in 1856, while the injury complained of did not take place until 1858, when on a single occasion the water was kept back for some weeks on the plaintiff's land and destroyed his crop. It was said there, that the cases of *Knapp* v. *Grand Trunk Railway Co.*, *Patterson* v. *Great Western Railway Co.*, *and Wallace* v. *Grand Trunk Railway Co.* (cited above), were all distinguishable, as the injury in those cases was complete when the act was done, and capable of an entire satisfaction. See also another case of *Vanhorn* v. *Grand Trunk Railway Co.*, 19 U. C. C. P. 264.

In *Wallace* v. *Great Northern Railway Co.*, 16 Q. B. (Ad. & E.) 643, the plaintiff's lessor had obtained an award for a certain sum for all injury and damage done to his estate by severance or otherwise, by the construction of the defendant's road. This was held only to include all damage known or contingent, by reason of the construction of the road, which was apparent, and capable of being ascertained and estimated at the time when the compensation was awarded, and not such as could not have been foreseen.

The case of *Follis* v. *Port Hope, etc., Railway Co.*, 9 U. C. C. p. 50, was cited by the defendants in favour of the contention that this action was barred altogether; but, in that case, only a single act of trespass, more than six months before the action was brought, was laid in the declaration.

In *Snure* v. *Great Western Railway Co.*, 13 U. C. R. 376, brought under 16 Vict., chap. 99 (section 10 of which is almost identical with the corresponding section of the present R.W. Act), ROBINSON, C.J., says, after quoting the section:—"The effect of this is to save the right of action for the whole damage, where the suit is brought within six months after the injury has ceased, and of course the action is saved as to all damage so long as the injury continues."

In *May* v. *Ontario and Quebec Railway Co.*, 9 Ont. R. 70, the meaning of the words in the Act, "by reason of the railway," and the closing words of the section are commented on.

In *Beard* v. *Credit Valley Railway Co.*, 9 Ont. Reports 616, it was held that the six months limitation clause did not apply to a case where the defendants had taken earth from some of the plaintiff's land lying outside the siding of the line. Mr. Justice Ferguson in giving judgment, refers to the case of *Brook* v. *Toronto and Nipissing Railway Co.*, 37 U. C. R. 372, as being in point, and in favour of the plaintiff's contention, and he upheld the principles laid down in that case, where the defendants took earth from a part of the plaintiff's land which had not been taken for the purposes of their railway. The fact that the defendants did not take or profess to take any land, but only took the material they found there, is commented on.

So far then as I can judge from the above cases, and a consideration of the words of the statutes referred to, I am of the opinion that:—

1st. The plaintiff has a right to recover, not only for what has been done by the defendants since he acquired the land, but also for the injury done before that, as there is no evidence, but rather the contrary, that any compensation was made therefor.

2nd. That arbitration was not the course to be pursued, but that the plaintiff has his right of action for the trespass at common law.

3rd. That the plaintiff is not limited to the damage for the six months previous to action brought.

There remains then only the question of the injunction asked for by the plaintiff.

This court has the power to grant such an injunction, but is it expedient to do so?

In *Graham* v. *Northern Railway Co.*, 10 Grant, 259, it is said that injunction depends very much on the reality and irreparable nature of the injury complained of, and obstructing ancient lights was held to be this nature.

In *Wright* v. *Turner*, 10 Grant, 67, where an acre and a quarter of the plaintiff's land was overflowed by the defendants, annual value $7 an acre, it was held that the plaintiff was entitled to the injunction, and that he was not to be forced to exercise his common law right of bringing an action yearly, and that the court was not at liberty to refuse the ordinary relief administered by it, merely because it might think the plaintiff unreasonable in insisting on it.

The plaintiff has the right to deal with his own land as he pleases and no court could recognize a right in any stranger to deprive him of it, or the use of it, though the quantity might be but an acre, for he might thus lose his land acre by acre.

The defendants will of course appeal from the common law to the statute, and claim the right to get what they want under that statute (42 Vict. c. 9). If this were so, and the defendants could acquire the right to flood the plaintiff's land under the powers given by that Act, I do not think the injunction ought to go. But on an examination of section 7, sub-sections 38, 39 and 40 of section 9 and section 10, I do not feel satisfied that the power to flood a man's land in the manner the defendants have done in this case, is conferred by that statute, nor yet by the private act of the defendants, 38 Vict. chapter 65, section 28.

By section 7 of the Public Railway Act, subsection 6, the company are empowered to construct, maintain and work their road across, along or upon any stream or water-course which it intersects, but the same must be restored by the company to their former state, or to such state as not to impair their usefulness.

Where these statutes affect the common law rights of the plaintiff, I do not care to construe them so as to confer the power to do what the defendants have done, unless I feel myself compelled to do so, and therefore I cannot refuse the order and injunction asked for. At the same time I would suggest that the plaintiff would only be doing what is reasonable, if he would accept what the jury have assessed as his damage, if the present state of things continues—that is, to make over to the defendants the piece of land on the north side of the railway, on payment of the verdict of $125 and his costs of suit.

Should he refuse to do this, and insist on his strict legal rights, he will be entitled to judgment for $50 and his full costs of suit in this court, together with an order directing the defendants to remove the obstruction, and restraining them from any repetition of the acts complained of.

To this extent the plaintiff's order *nisi* will be made absolute, and the defendant's order *nisi* will be discharged.

From this judgment the defendants appealed, and assigned the following reasons for appeal:—

The appellants submit that the judgment appealed from should be reversed for the following amongst other reasons:

1. The appellants are not trespassers; they erected the dam in question with the assent of the respondent's grantor for the purpose of obtaining water, which they were entitled to do under their statutory powers, and the respondent purchased the land, knowing that the appellants had constructed the dam thereon.

2. That the respondent's right to compensation, if any, is by arbitration, and not by action.

3. That if the respondent has any right to recover he is only entitled to damages for six months before action.

Consolidated Railway Act, 1879, 42 Vict. chap. 9, section 9, sub-sections 38 and 39; Northern Railway Act, 1875, 38 Vict. chap. 65, sec. 28.

Knapp v. *Great Western Railway*, 6 U. C. C. P., 187; *Patterson* v. *Great Western Railway*, 8 C. P., 97; *Clark* v. *Grand Trunk Railway*, 35 U. C. R., 57; *Cameron* v. *O. S. & H. R. R.*, 14 U. C. R., 612; *Follis* v. *Port Hope*, 9 U. C. C. P., 50; *McLean* v. *Great Western Railway*, 33 U. C. R., 198. *Welland* v. *Buffalo, etc., Railway Co.*, 31 U. C. R., 539.

On the 12th July, 1886, the appeal was heard by the Court of Appeal.

Boulton, Q.C., for the appellants.

Strathy, Q.C., for the respondent.

After argument the Court unanimously dismissed the appeal with costs.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

DUFFUS v. CREIGHTON.

Sheriff—Action against—Execution of writ of attachment—Abandonment of seizure—Estoppel.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ that he had seized the goods. The sheriff subsequently sold the goods under execution of the creditors. In an action against the sheriff,

Held, reversing the judgment of the court below, that the act of leaving the goods in the possession of S. was not an abandonment of the plaintiff's solicitor of the seizure and if it was the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

Russell, for the appellants.

Gormully, for the respondent.

UNION BANK OF LOWER CANADA v. BULMER.

Promissory note—Accommodation—Made by partner without authority—Renewal—Knowledge of holder.

In an action on a promissory note the defence was that the note of which it was a renewal was given for the accommodation of the payee by the defendant's partner who had no authority to make it, and that the plaintiffs when they took the renewal knew of its defective character.

Held, that as it did not appear that such knowledge attached when the original note came into plaintiff's possession they were entitled to recover.

Irvine, Q.C., for the appellants.

A. W. Atwater, for the respondent.

CASSELS v. BURNS.

Ships and shipping—Charter party—Damage to ship—Nearest port—Deviation.

A ship sailed from Liverpool in September under charter to load lumber at Bathurst, N.B. Having encountered heavy weather the captain found it necessary to make repairs and proceeded to St. John for that purpose. By the time the repairs were completed it was too late to go to Bathurst and carry out the charter. In an action against the owners for breach of charter the plaintiff obtained a verdict, the jury finding that the repairs could have been made at Sidney, C.B., and if made there could have been complete in time to load at Bathurst.

Held, affirming the judgment of the court below (20 N.B. Rep. 13,) that going to St. John to repair the ship was such an unnecessary deviation from the voyage as to render the owners liable for breach of charter party.

Skinner, Q.C., for the appellants.

W. Pugsley, for the respondents.

ELLS v. BLACK.

Trespass—Disturbing enjoyment of right of way—User—Easement.

E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots.

Held, affirming the judgment of the court below (19 N.S. Rep. 222), RITCHIE, C.J., and GWYNNE, J., and dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action.

Sedgewick, for the appellant.

Drysdale, for the respondent.

MOONEY v. MCINTOSH.

Trespass—Title to land—Boundaries—Easement—Agreement at trial—Estoppel.

In an action for damages by trespass by McI. on M.'s land and by closing ancient lights defendant claimed title in himself and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out of the pleadings all reference to lights and drains and to try the question of boundary only.

Held, affirming the judgment of the court below, RITCHIE, C.J., and GWYNNE, J., dissenting, that independently of the conventional boundary claimed by the defendant the weight of evidence was in favour of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years.

Semble, that if it was open to him such user was not proved.

Sedgewick, Q.C., for the appellants.

Henry, Q.C., for the respondents.

EXCHANGE BANK v. SPRINGER.

Surety—Cashier of bank—Buying and selling stocks—Negligence of Directors.

In an action against the sureties of an absconding cashier it appeared that the bank had become possessed of certain stock on the security of which advances had been made, and to save loss the stock was put on the market and other stock bought to affect the price. An account was kept in the books of the bank called the "C. R. M. Trust Account," in which these stock transactions were recorded. The cashier used this account to assist him in some private speculations, and having become a defaulter in a large amount he absconded.

Held, affirming the judgment of the court below (13 Ont. App. R. 390), that even if this dealing in stocks by the bank was illegal it would not relieve the sureties of the cashier from liability on their bonds.

Robinson, Q.C., and *Malone*, for the appellants.

Bain, Q. C., for the respondents.

GREENE v. HARRIS.

Practice—Set off—Not pleaded in action—Right to set off judgment—Equitable assignment.

G. and H. brought counter actions for breaches of agreement. In March, 1884, G. obtained a verdict with leave to move for increased damages, which was granted, and in June, 1885, he signed judgment. In April, 1884, G. assigned to H. all his interest in the suit against H. and gave notice of such assignment in May, 1884.

In February, 1885, H. signed judgment against G. on confession.

Held, reversing the judgment of the court below (25 N.B. Rep. 451), STRONG, J. dissenting, that H. could not set off his judgment against the judgment recovered against him by G. and assigned to H.

Weldon, Q.C., for the appellant.

THE EXCHANGE BANK OF CANADA v. THE PEOPLE'S BANK.

Bank cheques—Acceptance by cashier and president at a future date—Liability of bank.

In 1881 G. having business transactions with the Exchange Bank agreed with C., president and manager of the bank, that in lieu of further advances, the bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank after having it accepted as follows: "Good on 19th February, 1882." T. Craig, president, got the cheque discounted by the People's Bank, and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23rd of May, and it was presented at the Exchange Bank and paid. Thereupon another cheque for the same amount was accepted in the same way and discounted by the People's Bank on the 7th September, 1883. At the time of the suspension of the payment by the Exchange Bank, the Peoples' Bank had in its possession four cheques signed by G. and accepted by T. Craig, President of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable and duly protested and also after the three days of grace.

The total amount of these cheques amounted to $66,020.64, and one of them, viz., the one dated 7th September, 1883, for $31,000, was a renewal of the cheque, the proceeds of which had been paid to the credit of G. in the Exchange Bank. C. was manager as well as president of the Exchange Bank.

On an action brought by the People's Bank against the Exchange Bank for the recovery of the sum of $66,020.74, based on the four cheques in question, the Exchange Bank pleaded *inter alia* that C. had not acted within the scope of his duties and within the limits of his powers, and that the bank had never authorized or ratified his acceptance of G's cheque.

Held, affirming the judgment of the Court of Queen's Bench (STRONG, TASCHEREAU and GWYNNE, JJ., dissenting), that under the circumstances the Exchange Bank was liable for the acceptance by their President and Manager of G.'s cheques discounted by the

People's Bank in good faith and in due course of business.

Appeal dismissed without costs.

Macmaster, Q.C., for appellants.

Geoffrion, Q.C., for respondents.

GILLESPIE v. STEPHENS.

Reddition de comptes—Settlement by mandator with his mandatory without vouchers, effect of—Action en redressement de compte.

Held, affirming the judgment of the court below, that if a mandator and a mandatory, labouring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatory without vouchers or any formality whatsoever, such a rendering of account is perfectly legal; and that if subsequently the mandator discovers any errors or omissions in the account his recourse against his mandatory is by an action *en redressement de compte*, and not by an action asking for another complete account.

Appeal dismissed with costs.

Fleming, Q.C., and *Nicolls*, for appellant.

Carter, for respondent.

COURT OF APPEAL.

C. C. Oxford.] [September 29.

MURRAY v. HUTCHINSON.

Waiver of breach of contract.

The statement of claim alleged that the plaintiff purchased from the defendant some cattle, on the terms that the defendant should keep them on his premises until they should be in a condition fit to export; that the plaintiff paid the defendant $200 on account of the purchase; that the plaintiff afterwards demanded a delivery of the cattle, which the defendant wholly refused; and in breach of his contract sold and delivered the cattle to another person; and the plaintiff claimed to recover back the $200 deposit, which he had demanded before action, but which had been refused.

The defendant's version of the bargain was that the plaintiff was to pay the balance of the price and remove the cattle from the defendant's premises by a date certain, but that he failed to do so, and the defendant was obliged, after the date certain had passed, to sell the cattle at a much lower price; and he counter-claimed for damages in excess of the $200 in his own hands.

The jury found a verdict for the plaintiff for the $200 upon conflicting testimony.

Held, upon the evidence, that there was no ground for interfering with the findings of the jury; and that the plaintiff could waive the breach of contract, and, assenting to the improper disposition of the cattle, merely require the defendant to repay to him the money paid on account.

Aylesworth, for respondent.

Holman, for appellant.

C. C. Middlesex.] [September 29.

GRAHAM v. O'CALLAGHAN.

RUSSELL v. O'CALLAGHAN.

Replevin—Damages can be recovered for eloyned goods.

In an action of replevin, where the sheriff has been unable to replevy the articles mentioned in the writ by reason of their having been lost or eloyned by the defendant, the plaintiff may recover the value of the goods as damages where the count is in the detinet as well as the detinent.

Special damages are recoverable for the trespass to the goods actually replevied, and the plaintiff is not confined to nominal damages, usually given for the costs of the replevin bond.

Moss, Q.C., for appellant.

R. M. Meredith, contra.

C. C. Elgin.] [September 29.

LOGG v. ELLWOOD.

Question of fact for jury.

In an action for wages there was a dispute between the parties as to the nature of the agreement for hiring. There was evidence at the trial which would have supported a finding for either party. The question was wholly one of fact and of the credibility of witnesses. The jury found in favour of the plaintiff, but the judge set aside the verdict and sent the case to a referee, who found substantially as the jury had done. Upon motion the judge made an order sending the case back to the referee with instructions to find against the plaintiff upon one branch of the case.

Held, that the case was one specially proper for the decision of a jury, and that the verdict and finding of the referee should not have been interfered with.

J. Robinson, for appellant.

Doherty, for respondent.

C. C. Norfolk.] [September 29.

FORSE v. SOVEREEN.

Distress for rent—Lease may be reformed in favour of bona fide purchaser for value.

In an action for replevin of goods seized under a distress for rent, the plaintiff claimed that there was nothing in arrear, and proved the payment of certain sums to the solicitor of a first mortgagee, and also claimed a deduction of $15 for a quantity of manure expended on the demised premises under an alleged agreement with the lessor. The seizure was made by the defendant S., to whom the landlord had assigned the plaintiff's lease as collateral security for payment of a second mortgage. The lease did not express what was held at this trial to be the true agreement, that manure was to be supplied and $15 deducted from the rent during each year of the tenancy.

Held, that the lease ought not to have been reformed as against S., who was a *bona fide* purchaser for value without notice of the facts on which the plaintiff's equity depended.

Held, also, that although a new contract of tenancy may be inferred from a notice by the mortgagee to pay rent to him, acquiesced in by the tenant by payment of the rent, yet, as the circumstances of the case showed that it was not intended to create such a contract, but rather that, the interest being paid, the possession of the mortgagor and his co-tenants was to remain undisturbed, it could not be said that the plaintiff's tenancy had been put an end to by the intervention of the first mortgagee.

Aylesworth, for appellant.

W. N. Douglas, for respondent

CHANCERY DIVISION.

Ferguson, J.] [October 1

RE STEVENS.

STEVENS v. STEVENS.

Will—Legacies—Time for vesting.

S., by his will, devised four legacies to his daughters in four different clauses worded as follows: "I bequeath to my daughter (name) the sum of five hundred dollars." By a subsequent clause he provided "I also order that should any of my daughters die their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased in his lifetime, but had not paid for, was paid for, and all his debts paid, his two sons, E. and A. "shall each pay my daughter M. A. S. the sum of $50, which she shall receive together with the rent of Lot 126 from the executors, to apply on her legacy. The other three daughters to be paid in the same manner; E. in one year after M. A., etc." A direction was also given that in case of any of the daughters dying, their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source.

Held, on an appeal from a Master that these provisions, and all others of a like kind in the will, had reference at most to the mode and time of payment of the legacies, and not to the substance of the gift, and that as the

tator had not clearly, and with certainty expressed the intention that the legacies should not vest until the times of payment, the legacies were given in the ordinary way to vest upon the death of the testator.

Moss, Q.C., and *Hoyles*, for the appellants.

Maclennan, Q.C., for the infant.

Cassels, Q.C., for the respondent.

PRACTICE.

Dalton, Q.C.] [October 13.
Galt, J.] [October 17.

GARNER v. TUNE.

Counter-claim—Close of pleadings—Notice of trial—Rule 180.

The defendants by counter-claim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counter-claim of the original defendants. No subsequent pleading having been delivered the defendants by counter-claim after the lapse of four days, served notice of trial.

Held, that the pleadings were not closed, and the notice of trial was therefore irregular. The plaintiffs by counter-claim were entitled under Rule 180 to twenty-eight days from the delivery of the defence and counter-claim in which to amend.

Beck and *German*, for the defendants by counter-claim.

Echlin, for the original defendants.

Proudfoot, J.] [October 26.

STRUTHERS v. GLENNIE.

Voluntary conveyance—Subsequent creditor—Indebtedness of grantor.

Action by a subsequent creditor to set aside a voluntary deed executed about five years before the debt to the creditor was incurred. It appeared that the deed was not impeachable on the ground of any fraud or fraudulent intent on the part of the debtor or grantee, but that there was a debt due at the date of the deed which had not been paid. It, however, also appeared that this debt had become barred under the Statutes of Limitation.

Held, that the plaintiff could not succeed.

The only reason that a subsequent creditor is allowed to maintain such an action merely on the ground of the settler's indebtedness is that if a prior creditor set aside the settlement a subsequent creditor would be entitled to participate *pro rata*, so that he has an equity to participate, and may bring his action to enforce that equity. And if the antecedent creditor cannot impeach such settlement, neither can a subsequent creditor impeach it, merely on account of a settler's indebtedness to him.

Meredith, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *G. C. Gibbons*, for the defendants.

Armour, J.] [November 3.

REGINA v. MCGAULEY.

Indian Act, sec. 108—"Appeal brought"—Time.

The Indian Act, R. S. C. c. 43, s. 108, provides that no appeal shall lie from convictions under that Act, except to a judge of a Superior Court, etc., "and such appeal shall be heard, tried, and adjudicated upon by such judge, . . . without the intervention of a jury, and no such appeal shall be brought after the expiration of thirty days from the conviction."

Held, that the words "appeal brought" are satisfied by the notice of appeal having been given, and the appeal having been perfected by the giving of the security provided for by the Summary Convictions Act; and that it is not necessary for the appellant to bring his appeal to a hearing within the thirty days.

In re Hunter v. *Griffiths*, 7 P. R. 86, not followed.

Laidlaw, Q.C., for the defendant.

Kehoe, for the prosecutors.

Galt, J.] [November 5.

HILLIARD v. ROYAL INSURANCE CO.

Arbitration — Costs — Taxation — Time and expenses in travelling—Amount of fees.

Upon an appeal from the taxation of costs of an arbitration which the plaintiffs were ordered to pay,

Held, that items in respect of the loss of time in travelling, and travelling expenses of an arbitrator, were properly disallowed.

Held, also, that the amount to be allowed *per diem* to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with.

A. H. Marsh, and *Hilton*, for the defendants.
Kappele, for the plaintiffs.

Proudfoot, J.] [November 9.

IN RE MCRAE AND THE ONTARIO AND QUEBEC RAILWAY CO.

Arbitration—Railway—Costs—Taxation—R. S. C. c. 109, s. 8, sub-secs. 22, 23—Appeal—Witnesses—Subpœnas.

By the Dominion Railway Act, R. S. C. c. 109, s. 8, sub-secs. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the judge. The judge in this case, by an order not appealed against, referred the taxation to a taxing officer.

Held, that the question whether the judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the judge. By sub-sec. 23 of s. 8 of the Act, "the arbitrators . . may examine on oath . . the parties, or such witnesses as may voluntarily appear before them." In this case subpœnas were issued and witnesses attended upon them and were examined.

Held, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power therefore to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses.

Aylesworth, for the land-owner.
J. M. Clark, for the railway company.

Court of Appeal.] [November 10.

BULL v. NORTH BRITISH CANADIAN INSURANCE CO.

Appeal to Court of Appeal—Order of judge in court—Interlocutory order.

An order was made by a judge of the High Court of Justice, sitting in court, for the execution by the defendants (mortgagees) of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration.

Held, that an appeal to the Court of Appeal lay without leave, whether it was to be regarded as interlocutory or not.

Semble, per HAGARTY, C.J.O., and PATTERSON, J.A.—That such an order is not in its nature interlocutory.

C. Millar, for the plaintiff.
J. Maclennan, Q.C., and *D. Urquhart*, for the defendants.

REPORT OF THE COUNCIL OF THE BOARD OF TRADE IN THE MATTER OF J. B. M'KAY & CO.

The following is the report of the Council of the Board of Trade in the matter of Wm. J. and Ed. B. McKay, members of the board and members of the firm of J. B. McKay & Co., grain and commission merchants, doing business in the city of Toronto:—

The attention of the council having been formally directed to the conduct of Messrs. W. J. and E. B. McKay, members of the board and of the firm of J. B. McKay & Co., as it came out in evidence in certain arbitration cases recently held in these rooms, an investigation was instituted by the council in accordance with by-law No. 4. The Messrs. McKay have been duly charged with certain offences and having appeared before the council were heard at length in their own defence. The charges made against these members may be summed up briefly under three heads, viz.:

REPORT OF THE BOARD OF TRADE IN THE MATTER OF J. B. McKAY & Co.

1. That at various times between December, 1886, and April, 1887, they sold to several grain firms quantities of peas, wheat and barley delivered f. o. b. at Cavanville station, and by their express instructions verbally and in writing, the cars were billed several bushels each (ranging from two to ten bushels) in excess of the quantities loaded therein, and payment obtained for the full quantity the several cars were said to contain.

2. That the said McKays sold to George A. Chapman & Co. a quantity of marrowfat or black eyed peas, and by their express instructions verbally or by letter to their agent, a large quantity of an inferior quality or small peas was loaded in the cars along with the marrowfat peas, and payment was obtained therefor as if they were all marrowfat peas.

3. That in loading a quantity of barley for export the said McKays gave instructions in writing to their agent at Cavanville to load No. 2 barley, and to put in a quantity of No. 1 barley on the top and at the doors of the cars for the purpose of deceiving those who were buying the barley as to its real quality, etc.

In explanation and defence of these charges the said McKays denied any intention of defrauding. They alleged that the cars were underloaded and overbilled for the purpose of testing the accuracy of the measure made by the various elevators which the grain reached, and not for the purpose of obtaining payment for that for which they had not given value, and that they meant to refund the amounts overpaid so soon as the claims were made and the correct weights at the elevators established. They contended it was customary in the trade where the marrowfat peas were of an extra good quality, and perfectly justifiable for the purpose of bringing them to a merchantable standard, to mix a certain quantity of small peas with them, and that in so doing they were guilty of nothing wrong or unusual, and that there was no intent to deceive or defraud. And so in the mixing of the two qualities of the barley, they only did what is customary in the trade, and for the purpose of creating a good impression at the outset on the minds of those unloading the barley in the foreign market, and not with intent to deceive or defraud, and that in all these matters they have not been guilty of conduct unbecoming members of this board. Admitting for the moment the correctness of the plea that it was for the purpose of a test, and only a test, that the cars were loaded short, and that payment was obtained for a larger quantity of grain than was known to have been delivered in each car, the council does not hesitate to affirm that a most unusual and objectionable method was adopted for making this test, and the Messrs. McKay must not be surprised if the purity of their motives is called in question and a construction placed upon their course not at all creditable to them.

They had their doubts, it appears, as to the accuracy of the weighing and measuring done by the elevators and thought there was reason to believe shortage of some five bushels was claimed on every carload, whether the same was under or overloaded. To test this may have been a perfectly proper thing, and an opportunity might very well have been taken when they were exporting their own grain, but if the test were to be made with grain sold to others, the consent of the owners of the grain ought first of all to have been obtained; they should have been made privy to the experiment, and payment should not have been exacted from them for that which the McKays knew perfectly well had been wilfully withheld, and the council does not hesitate to say that such is not a practice in the trade, and that the same could not fail to produce disputes and annoyances, and to cast doubts on the uprightness and honesty of any who engage in it. But however plausible the plea of the "test," the evidence before the council does not admit of its acceptance as entitling the McKays to an acquittal on the charge of conduct unbecoming members of this board. They have stated that the shipping of peas is a new business to them in which they have had no experience. The suggestion of the test was made to them by an employé named Hunt, who was afterwards dismissed, and with whom they had a quarrel, but Hunt, according to the evidence, only asked for permission to make a test with one car. The whole correspondence with Hunt, wherein instructions are given him to load one lot after another short, does not bear out the plea of the test as the sole motive. In none of these letters is the test even mentioned. In invoicing and obtaining payment for a quantity of grain underloaded, the absence of all sensitiveness on the McKays' part when mention of shortages was made by one after another of the purchasers of the short grain, their neglect, delay and refusal to refund the amount overcharged, are all against the test theory, and before restitution could be had, four separate and distinct cases of claim have to be referred to the Board of Arbitration, causing loss of valuable time, annoyance and costs. If claims were made for more shortages than the McKays were ready to admit, it was no more than might have been expected. If underloading and overbilling took place at one point where they were shipping it was presumptive evidence it was going on at other points, and that this was the probable way of accounting for short-

age. The council holds therefore that the plea of the "test" is insufficient, and inadmissible as justifying this course, the consequences of which have been so annoying and destructive of that good feeling and confidence which should exist between members of this board having large business transactions together, and adjudge that Messrs. McKay should be disciplined for the same. As to the mixing of the peas, the council is of opinion that the plea of the custom of the trade is not well founded, nor is it a custom they can commend as one calculated to facilitate transactions of this kind where sales and purchases are made of an article of commerce known and dealt in by a specific name. That there may be different grades of marrowfat peas may be admitted, but if an extra price cannot be obtained for an extra fine sample, the cure is not to be found in reducing the average quality by a mixture with an entirely different kind and inferior quality of pea. The council deems it just, therefore, to condemn the McKays for their procedure in this case, and holds them worthy of discipline therefor. As to the charge summed up under No. 3, the council would be sorry to have it go forth to the world that it is a custom in the trade so to load and ship grain as to deceive the receivers in the foreign market as to the actual quality or grade purporting to be delivered to them. It does not appear from the evidence that the McKays were guilty of anything under this count which calls for action on the part of the council or board. The verdict of the council therefore is, that the said W. J. and E. B. McKay have been guilty of conduct unbecoming members of this board and highly to be reprehended, and the sentence of the council is, that they be suspended from all the privileges and uses of this board—W. J. McKay for the period of six months, and E. B. McKay for the period of twelve months, from this date—and that this report be printed and a copy mailed to each member.

Painful as has been the duty imposed upon the council in this case, and unfortunate as it may be that the good name of the members as a body should be impugned thereby, it may not be without its uses, that it should be clearly understood the council will not flinch from carefully investigating every such case properly brought under its notice, and will impose such penalty as the nature of the offence may require, with a view to enforcing that straightforward honesty and rectitude so essential to the proper conduct of business everywhere, and so becoming the members of this large and important body.

FLOTSAM AND JETSAM.

SOME of the criminal sentences imposed by English magistrates seem very inconsistent and capricious. Here are a few samples:—A man for stealing a hand-cart, five years' penal servitude; and another man for assaulting a fellow-workman and knocking out his eye, forty shillings fine! A man for begging bread when he was unable to obtain employment, ten days' imprisonment at hard labour; and another, for going to the workhouse rather than accept employment at three shillings a day, a month's servitude and twelve strokes of the cat-o'-nine-tails! Again, a man for stealing a cotton shirt, five years' penal servitude; and another man for criminal assault upon two infants, three months' imprisonment! The *Law Times* says:—"We are not surprised to see some comments in the press on the sentences inflicted by Mr. Justice Day. Eighteen months' imprisonment of a clergyman for marrying a person who was under age without due publication of banns; penal servitude for life on a boy for attempting to extort money by threats of false accusation; and eighteen months' imprisonment of the young man called Rowden, or Rawden, for falsely publishing in a newspaper that he was engaged to marry a young lady of high rank, are really a group of sentences which must excite amazement in the ordinary mind. Indeed, when we compare them with the punishments often awarded by judges for offences complicated with violence, they would appear to be eccentric, and passed with a view to invite the interference of the Home Secretary." Down in Texas, as we may have remarked before, they sometimes punish a man more for stealing a mule than for killing a man; but then perhaps the mule is worth more. All this matter of sentences depends on the magistrate's digestion. If he makes a good breakfast, and his wife has not nagged him, the criminals get the benefit. Sometimes we are inclined to believe in the practice of letting the jury assess the punishment. It may be that one man is as little fit to decide continually on the measure of punishment as he is to pass upon disputed questions of fact.—*Albany L. J.*

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (1-33.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33)

1890
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.

1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office

or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Copies of Rules, price 25 cents, can be obtained from Messrs. Rowsell & Hutchison, King Street East, Toronto.

THE illustrations of *The Illustrated London News* (American edition) for November 5th, present as usual instruction as well as entertainment, and cover the customary broad range of this long established and widely known publication. They are indicated by the following titles: Sketches of the Bulgarian Elections; The Disputes Between Fishermen at Plymouth; State of Ireland; The Late Mrs. Craik; H.M.S. Wasp; Sketches on the River Congo; Sketches at the Cat Show; Crystal Palace; The Late Lady Brassey; Grand Durbar at Mandalay; In the Semois Valley; Ardennes; A Tame Lion, Algiers; and The Kali Ghaut, Calcutta. Reading matter in abundance is also provided, while now it is becoming quite generally known that newsdealers everywhere sell the paper for ten cents. Subscriptions can be sent direct to the New York office, which is in the Potter Building.

The issue of November 12th furnishes their many readers, in connection with a wide variety of reading, the following timely illustrations: A very spirited picture of the unemployed in London, entitled "The Police and the Mob"; three pictures upon the State of Ireland; one of How Some of the London Poor Spend the Night; and another of the Poor Helping the Poor, as well as the meeting of the unemployed in London. There are also sketches from the Burlesque of "The Sultan of Mocha," at the Strand Theatre, and one page devoted to the Sultan of Morocco, while the opposite page presents J. L. Seymour's drawing of "A Favourite Slave." Besides these attractions there is a double-page picture of Buffalo Hunting in North America.

Canada Law Journal.

VOL. XXIII. DECEMBER 1, 1887. NO. 21.

DIARY FOR DECEMBER.

1. Thur...Sittings of Divisional Court Chancery Division begin. Lord Chancellor Hardwicke born 1690.
4. Sun.....*2nd Sunday in Advent.*
5. Mon....Courts of Justice in England opened 1882.
6. Tues...C. C. York sittings for trials begin.
8. Thur...Sir W. Campbell, 6th C. J. of Q. B., 1825.
10. Sat.....Michaelmas sittings end.
11. Sun.....*3rd Sunday in Advent.*
13. Tues...C. C. sittings for trials commence, except in York.
14. Wed...Christmas vacation in Supreme Court of Canada and Ex. Ct. begins.

TORONTO, DECEMBER 1, 1887.

MR. HENRY REEVE, who for fifty years has been in the public service, and who since 1853 has held the office of registrar of the judicial committee of the Privy Council, has resigned his office. His long and faithful service was publicly recognized by Sir Barnes Peacock in an address which he made at the Bar on the opening of the sittings of the committee for business on 2nd November last. Such a graceful recognition of his merits as a public officer must have been exceedingly gratifying to Mr. Reeve and his many friends, not a few of whom are to be found in the ranks of the colonial bars.

THE following judicial appointments have been made in Quebec and Manitoba. In Quebec Mr. Tellier, of St. Hyacinthe, has been appointed Puisne Judge of the Superior Court of Lower Canada, in the place of Mr. L. J. Sicotte, resigned—Mr. A. N. Charland taking the seat on the same bench formerly occupied by Mr. H. W. Chagnon, resigned. In Manitoba Mr. John Farquharson Bain, Q.C., has been made a judge of the Queen's Bench in place of Mr. Justice Taylor, recently appointed Chief Justice of that court.

THE vacancies in our Bench have been filled by the appointment of William Glenholme Falconbridge Q.C., and William Purvis Rochford Street, Q.C., to the Queen's Bench Division, and Hugh McMahon, Q.C., to the Common Pleas Division. We congratulate these gentlemen on their promotion. Whilst they have not perhaps occupied the front rank in the profession as leading counsel their selection gives the assurance that the law of the land in their hands will be honestly, conscientiously and industriously administered. They are all men of ability and of business experience. Mr. Falconbridge had a brilliant career as a young man at the University, and was gold medallist in modern languages. Mr. Street was a gold medallist in law, and is a sound and well-read lawyer. Mr. McMahon was the head of a large legal firm, and one of the leading men on circuit in the Western district.

SIR ADAM WILSON, Knt.

THE Hon. Chief Justice Sir Adam Wilson, Knt., during the present Term resigned his position as Chief Justice of the Court of Queen's Bench, and President of the High Court of Justice for Ontario.

A very brief history of the learned Judge will be acceptable to the profession at the present time. Sir Adam was born in Edinburgh on the 22nd September, A.D. 1814, and came to this country in 1830. He resided for a time in the township of Trafalgar with an uncle, Col. Chalmers, at one time M.P. for Halton, and who was engaged largely in milling and merchandise. His father's family followed soon after. The only member of that

family living is Mr. Geo. H. Wilson, accountant in the Bank of Montreal.

In January, 1834, he was articled to the law in the office of Baldwin and Sullivan. He was there a diligent student, and was called to the Bar in Trinity Term, 1839, remaining in the management of the office for Hon. Robert Baldwin until he went into partnership with that eminent man in January, 1840. This partnership continued until 1849 when it was dissolved, Mr. Baldwin retiring from the practice of the profession. He was appointed a Queen's Counsel in 1850. In the same year Mr. Wilson formed a partnership with Dr. Larratt W. Smith, and subsequently with Mr. John Hector, Q.C., which continued until 1856, when a partnership was formed with (now) Hon. Mr. Justice Patterson and Mr. James Beaty, Q.C.

Mr. Wilson, who now applied himself to Counsel business only, though his clients were many, found time for public affairs and took a lively interest in the politics of the day, being then allied with that party that was led by his partner and friend Mr. Baldwin. He took an intelligent and earnest interest in municipal affairs; and was, it may truly be said, the best municipal lawyer in Ontario, at a time when municipal administration was not as well understood as now.

In 1859 and 1860, he sat as Mayor for the city of Toronto, having been the first Mayor elected by the general vote. Mayor Wilson may also be said to have been the first practical municipal reformer Toronto ever had. He entered with zeal into all things pertaining to city interests, and met with the usual conflicts, misinterpretations and misrepresentations of those set upon reforming abuses. The people at large supported him throughout, and he was eminently successful. He consolidated the city by-laws, then in indescribable confusion, and fully organized the Municipal machinery. He also took a marked interest in the police, and compiled for them a handy book of law on the "Office of Constable," which has been a standard book of reference ever since. He had the honour of receiving, as Mayor of the city, His Royal Highness the Prince of Wales in 1860, and everything so far as Toronto was concerned passed off satisfactorily.

In 1856 Mr. Wilson was appointed one of the commissioners for consolidating the statutes. To this he applied himself with his usual zeal and industry until the work was complete. Not content with municipal honours, he entered into the larger field of Canadian politics, and in 1860 was elected as member for the North Riding of York in the Parliament of Old Canada. He represented that constituency until his appointment to the Bench in 1863. During part of this period, in 1862, he held the office of Solicitor General and Executive Councillor in the John Sandfield Macdonald administration. Appointed in the first place to the Court of Queen's Bench, he only remained there a few months when he went to the Common Pleas, changing places with Mr. Justice Morrison. He afterwards went back to the Queen's Bench along with Hon. Chief Justice Sir Wm. Richards, at the time when Mr. Justice Hagarty became the Chief Justice of the Common Pleas. Thus for the second time in 1868 he took his seat in the latter court. He became Chief Justice of the Common Pleas in 1878, and of the Queen's Bench in 1884.

Always regarded as a sound and able lawyer, painstaking and industrious to a great degree, most fearless and conscientious in the discharge of his duties, as well in his judicial capacity as well as elsewhere, he was distinguished for his never failing courtesy to the Bar and

to the students, even under circumstances that are occasionally calculated to upset the equanimity even of the most patient judge. His self-possession and dignity never forsook him. All who appeared before him were sure of a patient hearing and undivided attention, and a certainty that their arguments, however trivial they might seem, would receive due and careful consideration. His was one of the most receptive of minds and always on the alert. Probably there was no lawyer at the Bar and no judge on the Bench his superior in the knowledge of decided cases. His industry, patience and exhaustiveness were proverbial; his judgments being almost text books on the law of the case in hand. A most retentive memory enabled him to recall authorities and facts at will, and he had a large capacity for marshalling facts. He became President of the High Court of Justice upon the passing of the Judicature Act.

Before his resignation the Chief Justice was knighted by Her Majesty. This honour, it is believed, he had formerly once, if not twice, declined to accept. Early in life he married Miss Dalton, sister of R. G. Dalton, Esq., Q.C., the esteemed Master in Chambers.

Mr. Æmilius Irving, Q.C., representing the Benchers and the Bar, presented to him, upon his retirement, expressions of great esteem and regard for his great ability manifested during his well nigh quarter of a century on the Bench. There was a large attendance of the Bar on the occasion, and the learned Chief Justice made a feeling and eloquent reply.

We may well close this short notice of one of the most eminent of our Judges and one of the most widely and highly respected of Canada's worthies, by quoting the true and apt observations of the Hon. Chancellor Boyd, now Sir Adam Wilson's successor as President of the High Court of Justice, upon the occasion of the swearing in of Hon. Mr. Justice Falconbridge as senior puisne judge of the Court of Queen's Bench during Michaelmas Term:—"Before I engage in the first public act of my new position I may refer briefly to him whom I succeed as President of the High Court of Justice. It is a matter of sincere congratulation that this vacancy has been occasioned, not by death but by choice; that Sir Adam Wilson, unlike most of his judicial brethren, has not laid down his life with his work. His merits need no commendation at my hands. Untiring industry, unselfish devotion to the duties of his office, and unblemished integrity are some of the well-known characteristics of his public life. His judicial life proper is embodied in many volumes of reports which will carry on to future time the best memorials of his ability and erudition. More I need not say, except there has never passed from this Bench any judge better known, more loved, or more venerated than Chief Justice Sir Adam Wilson. Our best wishes accompany his retirement. Long may he be spared to enjoy the well-earned measure of a dignified and honourable old age."

DISALLOWANCE—MANITOBA AND THE NORTH-WEST.

THE Disallowance Question in Manitoba has been much written about in newspapers and periodicals, but a few words on some points from their legal aspect, not generally adverted to in articles on this most important question may be useful to a right understanding of the subject. In the Act respecting the Canadian Pacific Railway, 44 Vict. chap. 1 (1881), it is recited in effect that the construction of the railway (C.P.R.) was stipulated by the terms of the admission of British Co-

lumbia into the Union, that Parliament preferred its construction and operation by an incorporated company rather than by the Government, that the greater portion was still unconstructed, and that in conformity with the expressed desire of Parliament, a contract had been entered into for its construction and permanent working, a copy whereof was annexed to the Act and submitted to Parliament for its approval; and the first section of the Act approves and ratifies this contract and authorizes the Government to carry out its conditions according to their purport. It is enacted that the company shall have the right to build and work branches from any point on the main line to any point or points within the Dominion; that for twenty years from the date of the contract (21st October, 1880) no line of railway shall be authorized by the Dominion Parliament to be constructed south of the C.P.R. from any point at or near the C.P.R., except such as shall run south-west or to the westward of southward, nor to within fifteen miles of latitude 49; and that in the establishment of any new province, provision shall be made for continuing such prohibition after such establishment until the expiration of the said period.

The Governor is then authorized to grant a charter of incorporation to the contracting company in the form appended to the contract and to the Act, and granting them the franchises, privileges and powers embodied in the contract, and which being published in the *Canada Gazette*, shall be held to be an Act of incorporation of the company, and have effect as if it were an Act of the Parliament of Canada. Under this contract so confirmed, the company have acted and are acting, and claim the exclusive privilege therein stipulated for twenty years from its date, and the right of constructing branches as therein provided at any time, under the conditions mentioned in the contract: and the words "The Canadian Pacific Railway" are declared by the contract to be intended to mean the entire railway as described in the Act 37 Vict. c. 14, *i.e.*, from a point near to and south of Lake Nipissing, to its terminus at some point in British Columbia on the Pacific Ocean. This provision as to branches does not exclude the construction of other railways by other companies as the twenty year monopoly clause does, though it has been objected to as being too extensive, and as in some cases virtually preventing their construction.

The twenty year monopoly clause has given rise to much difficulty. The Manitoba Legislature, holding that it did not apply to that Province as originally constituted and bounded, passed an Act authorizing the construction of a railway from Winnipeg to the southern Provincial boundary, and this Act was disallowed by the Governor under the B. N. A. Act. The Manitoba Government undertook to make the railway under their Provincial Public Works Act, or of their own right. Exceedingly unpleasant litigation and bad feeling have been, and are the consequence: and the Dominion Government has been violently abused for the disallowance, and I think improperly and unjustly. The Provincial Act seems to have been beyond the powers of the Provincial Legislature under sec. 94 of the B. N. A. Act (*a*), as relating to a railway "extending beyond the limits of the Province," if not according to the *letter* certainly according to the spirit of the said sec. 94, which expressly applies to railways connecting one province with another, and could hardly be intended not to apply to a railway connecting, as this was avowedly intended to do, a Province with a foreign country. Sec. 91 of the B. N. A. Act expressly subjects ferries between a province and any foreign country to the *exclusive* jurisdic-

tion of the Dominion Parliament; and for good reason, any such ferry (and *a fortiori* any such railway as that in question) requiring attention and regulation by the Dominion Customs department. At any rate if there be doubt, the unquestionable duty of the Dominion Government was to use its power of disallowance, as well as any others it might possess, to give effect to the contract between Parliament and the C.P.R. Company, and to keep the faith and honour of Canada intact. And this duty will devolve also on any other Government succeeding that in power when the contract was made, or Canadian bonds will become of small account on the world's exchanges. Whether the contract was good and wise or not, does not affect this point. The contract must not be broken without the consent of the C.P.R. Company or its failure to perform the conditions it undertook. What any member or minister may have said in the House or out of it matters not; there is no doubt that Parliament by the said Act, grants and must have intended to grant the twenty year monopoly, and it was part of the consideration for which the company undertook to make the railway, and made it. W.

LEGAL LEGISLATION.

THE report of the Committee on Legislation from the County Law Association to the Benchers of the Law Society has just been published and is a very important and valuable document. It recites that subsequent to the formation of the Joint Committee on Legislation from the Law Associations of the counties of York and Wentworth, it was deemed desirable to enlarge the committee by inviting representatives to be present at its meetings, from all the law associations of Ontario as well as from Local Bars of counties wherein no law associations had been formed.

The committee formed from these various representatives met from time to time, and gave the proposed rules of practice and procedure careful consideration, having been assisted by various suggestions which have from time to time been forwarded for consideration by law associations not represented at the meetings of the committee.

The Report goes on to say that at an early meeting of the committee it was decided to prepare a proposed code of civil procedure, and with this object a scheme for such a code was prepared for consideration and was laid before the Attorney General, who, while giving it a general approval, expressed his opinion that the proposed code contained more than the Judges could properly adopt, and still more, in view of their other engagements, than they would have time to consider. The Committee therefore confined their consideration to such additions and alterations to be now made in the existing rules and practice as they deemed substantially material, and as might give to the Statute Commission the minimum of work in considering and adopting them.

The prominent features of the revision as set out in the report are:—

1. The abolition of all written Rules of Practice not contained in the rules now under revision, with a provision that decisions in matters not provided for by the rules, shall be by analogy thereto and not to the former practice, and the provision that no rule hereafter made shall be of any force until it is promulgated by publication in the *Gazette*.

2. The creation of a permanent circuit list for the trial of all actions in the High Court, and the necessary re-arrangement of the sittings of the Divisional Courts. It has been found impossible to provide for four sittings of the High Court in every county town, but a rule has been drawn providing for three sittings a year in the principal county towns with power to direct special sittings when required. The rule provides for the present number of sittings in Toronto, Hamilton and London. A short experience of the system will be necessary to perfect its working.

3. Provision that one Judge shall sit in each week for the disposal of all business of the High Court, to be done in court and in chambers, with-

out regard to the divisions in which the actions are pending.

4. The re-distribution of offices in Toronto, so as to secure that all proceedings in an action from writ to judgment shall be taken in one office, viz., the Records and Writs Office.

5. The abolition of the office of Judgment Clerk, and the provision for giving Deputy Registrars the same power of settling minutes of judgment as are possessed by the Registrar, subject to the right to move to vary the minutes.

6. The abolition of writs for the execution of extraordinary remedies and the substitution of orders therefor.

7. The abolition of references to arbitration, the same object being secured by reference to Referees, and consequent thereupon the substitution of appeal from Referees' reports of the same nature as appeals from Masters' reports, for motions against awards.

The old act respecting arbitrations, making submissions rules of court, etc., has been inserted in the new Revised Statute, but it is hoped that upon approval of these rules, this act will be repealed.

8. Provision that all motions which require to be set down shall be set down in the Registrar's office.

9. The abolition of Orders *nisi* and summonses. A rule has also been drawn providing that it shall not be necessary to move separately against the findings of a jury and the judgment thereon, but that a motion against the judgment alone shall be sufficient.

10. Provision that every judgment shall be drawn up, signed and entered, as a decree formerly was.

11. The old Chancery Rules as to setting down demurrers and amending pleadings which have been demurred to, have been substituted for the rules of the Judicature Act.

12. The amendment of the rules in such other respects as are necessary to secure uniformity of practice in all casses, and the exercise of jurisdiction by all the Judges of the High Court without regard to the divisions to which they are attached, or to the divisions in which the actions are pending.

13. Provision that payment into court by a defendant with his defence be simplified, by requiring the money to remain in court subject to order, unless the plaintiff take it out in satisfaction of the very cause of action or matter for which it was paid in.

14. Provision that the order for delivery and taxation of a solicitor's bill follow the old Chancery practice, according to which one order contained directions to deliver, tax, take accounts and pay over balance. Provision has also been made that when a party secondarily liable on a bill applies for taxation and it appears that he is precluded by payment having been made by the party primarily liable the matter may be referred summarily for the taking of the accounts without the necessity of an action.

15. A rule has been drawn providing that unless the incorporation of a plaintiff corporation is specifically denied by the pleading, it shall not be necessary to prove it.

16. The making a clear distinction between defence and counterclaim.

17. The reduction of the several modes of securing the attendance of a party or witness for examination or cross-examination before trial to one method, viz., by subpœna and appointment.

18. The extension of the right to cross-examine on an affidavit on production to all deponents instead of restricting it to officers of corporations.

19. A rule has been drawn providing that special cases may be stated in every proceeding, and not only in actions.

20. Provision that execution is to issue forthwith upon judgment by default.

21. A general rule has been drawn, providing that whenever security for costs or for prosecuting any proceeding is required, the party to give security may pay money into court in lieu of giving a bond.

22. As to absconding debtors, the Act has been inserted in the new Revised Statutes, and this prevents this scheme from being carried out in its entirety. Rules have been drawn in accordance with the scheme of the Committee, by which an order for attaching the goods of an absconding debtor may be issued; when once the goods have been attached it shall not be necessary to issue another order, but all parties who come in and prove their claims in the action within six months shall be entitled to share in the proceeds. These rules will remain in suspense until the meeting of the Legislature, whereupon the Absconding Debtors' Act may be repealed in so far as it deals with procedure.

23. Rules have also been prepared assimilating the practice in proceedings in the nature of *quo warranto* to those of an ordinary motion, which will also remain in suspense until confirmed by the Legislature.

In addition to the foregoing matters, which have been embodied in draft rules, the committee have made the following suggestions:

I. That a Rules Committee, consisting of the Chief Justices, the Chancellor, and the Attorney-General, and such of the Judges as may be chosen

should form a permanent Rules Committee, and that the sole power to make rules should be vested in that committee.

II. That some means should be devised to settle definitely, before a case is called for trial, whether it is to be tried with or without a jury. Upon this point the committee have taken pains to ascertain the views of the profession, and after elaborate inquiry the committee have unanimously came to the opinion that all cases entered upon the jury list for trial should be tried by a jury, and that all cases entered upon the non-jury list for trial should be tried without a jury, unless by consent of parties, and that the Judge at the trial should have no power to vary the mode of trial.

The committee intend that the effect of this recommendation, if adopted, shall be to cast upon the Judge before whom any application to strike out or add a jury notice shall come, the duty of considering the nature of the action, the evidence likely to be adduced, and the circumstances likely to arise affecting the application, instead of, as has occurred in many cases, throwing that duty upon the trial Judge.

III. That some means of more rapidly obtaining copies of evidence should be devised than the present.

IV. That the rules respecting the jurisdiction of Local Masters taken from 48 Vict., cap. 13, sec. 21, and J. A. Rule 584, should confine the jurisdiction to such Masters as do not practise.

V. That the rules as to pleading should be amended so as to prevent the pleading of a joinder of issue to a statement of claim or counterclaim, and that where the plaintiff pleads a simple denial of the defendant's pleading, he should be at liberty to close the pleadings by filing a similiter.

Great care has been given in the revision to the logical arrangement of the rules, and they have been subjected to careful verbal criticism and consequent correction.

Elaborate headings to the divisions and subdivisions are to be interspersed throughout the rules.

The report concludes as follows:

Several memorials were laid before the committee upon the subject of changing the period of Long Vacation, but the suggestions made by these memorials were so many and varied that the committee have not suggested any change in the rules governing this vacation.

The committee have also taken active steps with a view of obtaining an increase of judicial salaries, and they request that this question be left by Convocation with the committee to take such further steps as may be deemed advisable in continuing to urge upon the Government this important question.

The committee desire to express to Convocation the high opinion formed by them of the usefulness of the County Law Associations. These bodies form ready means of obtaining opinions on subjects of professional interest from Local Bars which opinions cannot be obtained from counties in which such association do not exist. No associations have been formed in the following counties; Carleton, Grey, Hastings, Huron, Kent, Lambton, Lanark, Leeds and Grenville, Lennox and Addington, Lincoln, Northumberland and Durham, Oxford, Perth, Peterborough, Simcoe, Stormont, Dundas and Glengarry, Waterloo.

The committee urge upon Convocation the taking steps to procure the formation of Law Associations in these counties under the liberal provisions of the rules relating to county libraries.

This report is signed by Mr. John Hoskin, Q.C., and Mr. Walter Barwick, the energetic Chairman and Secretary respectively of the Association.

Under the direction of the Attorney General the rules as revised will be laid before the Judges, he himself having approved of many of the proposed changes. Under these circumstances, and after the very careful consideration given to the subject by the committee, it may be assumed that the rules will, with some slight alterations or additions, be adopted.

It has usually been that changes in procedure have resulted from the thought and experience of individuals more of less competent to judge of what changes are desirable; but this matter has been taken hold of by the profession as a body, and the details carefully discussed by those who are best able to express an opinion on the subject from their daily practice. We may therefore expect with some certainty that a step has been taken in the right direction. The work of the committee is a result of the formation of the local law associations. Without these bodies there would have been no possibility of securing an authoritative expression of opinion on the contemplated changes in procedure from the Bar as a body.

The profession are much indebted to those of their body who have spent so much time and energy in this labour of love.

RECENT ENGLISH DECISIONS.

The *Law Reports* for November comprise 19 Q. B. D. pp. 509-567; and 36 Chy. D. pp. 113-261.

INFANT—NECESSARIES—EVIDENCE.

Commencing with the cases in the Queen's Bench Division, *Johnstone* v. *Marks*, 19 Q. B. D. 509, is the first to claim attention. In this case Lord Esher, M.R., and Lindley and Lopes, L.JJ., sitting as a Divisional Court of the Queen's Bench Division, held that where an infant is sued for the price of goods sold to him on credit, he may, for the purpose of showing that they were not in fact necessaries, give evidence to show that at the time of the sale he was sufficiently provided with goods of the kind supplied. The judge at the trial, on the authority of the well known case of *Ryder* v. *Wombwell*, L. R. 4 Ex. 32, held that in order to entitle a plaintiff to succeed it was sufficient to show that the goods supplied were of the class which the law regards as "necessaries," and that the question whether the infant had, or had not, at the time of the sale already a sufficient supply of such articles, was immaterial; but the Divisional Court were unanimous that the evidence rejected was admissible, following *Barnes* v. *Toye*, 13 Q. B. D. 410; and intimated that if they were sitting as a Court of Appeal they would have come to the same conclusion.

HUSBAND AND WIFE—MARRIED WOMAN—CONTRACT—SEPARATE PROPERTY—MARRIED WOMEN'S PROPERTY ACT, 1882 (47 VICT. C. 19, S. 1. SS. 2, 3 ONT.).

Palliser v. *Gurney*, 19 Q. B. D. 519, is a decision of Lord Esher, M.R., and Lindley and Lopes, L.JJ., sitting as a Divisional Court of the Queen's Bench Division, to which we have already referred *ante* p. 302. The short point decided is that in an action against a married woman to recover the price of goods sold and delivered to her, it is necessary for the plaintiff to show that the defendant had separate property at the time she made the contract. Lopes, L.J., puts the point decided very concisely at p. 521:

> The disability of a married woman to contract was remedied by the Married Woman's Property Act, 1882, but only to this extent—that she may now enter into a binding contract in respect of her separate property. If she has no separate property she still cannot contract. I entirely agree with the decision of Pearson, J., in *In re Shakespear, Deakin* v. *Lakin*, 30 Chy. D 169, that the contract which is to bind future separate property must be entered into at a time when the married woman has existing separate property.

STOPPAGE IN TRANSITU—DELIVERY OF GOODS ON BOARD SHIP—TERMINATION OF TRANSIT.

Bethell v. *Clark*, 19 Q. B. D. 553, is a decision of a Divisional Court composed of Mathew and Cave, JJ. The facts of the case were as follows: T. in London bought goods of C. in Wolverhampton, and sent C. a consignment note in the following terms: "Please consign the ten hds. hollow ware to the *Darling Downs*, to Melbourne, loading on the East India docks here." C. sent the goods per railway accordingly, to Poplar for shipment, and they were shipped on board at noon on July 3. On the same day at 10 o'clock he telegraphed to the railway company not to deliver the goods, and the railway company telegraphed to their agents at Poplar to the same effect, but the message did not arrive in time to prevent the shipment of the goods. The master's receipt of the goods was given to the railway company and by them forwarded to C. No bill of lading was applied for by any of the parties. On July 11 the purchaser T. became bankrupt. On August 15 C. notified the ship owners that he claimed the ten hds. as his property. They were also claimed by T.'s trustee in bankruptcy. The court held that there had been no constructive delivery to T., and that the transitus was not at an end when the goods were delivered on ship board; though the case would have been different, in the opinion of Cave, J., if the purchaser had then obtained bills of lading.

LANDLORD AND TENANT—SHERIFFS' LIABILITY FOR REMOVING GOODS UNDER EXECUTION AFTER NOTICE OF RENT IN ARREAR—MEASURE OF DAMAGES—8 ANNE, C. 14, S. 1.

The only other case in the Queen's Bench Division is *Thomas* v. *Mirehouse*, 19 Q. B. D. 563, which was an action brought by a landlord against a sheriff under 8 Anne, c. 14, s. 1, for removing goods taken in execution, without

paying the landlord a year's rent. The case was brought up by way of appeal to a Divisional Court composed of Lord Esher, M.R., Lindley and Lopes, L.JJ., from a County Court on the question of the proper measure of damages. The court dismissed the appeal, holding that *prima facie* the proper measure of damages in such cases is the amount of the rent due, but that it is open to the defendant to show, in mitigation of damages, that the goods were of actually of less value than the amount due for rent, in which case the damages should be for the lesser sum. But that the mere proof that they fetched less than the rent due, when sold at a forced sale, was not evidence of the goods being of less value than the rent in arrear.

INJURY TO PROPERTY BY FLOOD—DAMAGES—INJURY TO REVERSION.

Taking up now the cases in the Chancery Division, *Rust* v. *Victoria Graving Dock Co.*, 36 Chy. D. 113, which is a decision of the Court of Appeal, claims our attention. The action was brought to recover damages for flooding land, in part of which the plaintiff was interested as owner in fee, in possession, and part as lessor. As to the part to which he was entitled as tenant in fee, in possession, it was held that he was not entitled to compensation for the loss arising from reduced rental for four years in consequence of the prejudice against the neighbourhood caused by the flood, inasmuch as that was a loss which was not the result of, or directly caused by the flood. And as to the land subject to lease, it having been found as a fact, that no injury had been sustained which would last to the end of the lease, it was held that damages for the temporary depreciation of the selling value of the landlord's interest were not recoverable. As to part of the property subject to building agreements under which the plaintiff had advanced money to the builders on the security of the property, damages had been allowed on the basis of deducting the value of the houses when repaired and completed, less the expense of repairing and completing them, from the amount advanced, and the difference was awarded for the depreciation of mortgage securities; but it was held that this was erroneous, and that an inquiry should be directed as to what extent the flood had made these houses a less sufficient security for the plaintiff's advances than they were before.

An allowance of three months' estimated rent, for delay in letting part of the land which was vacant was upheld.

UNDUE INFLUENCE—CONVENT—VOLUNTARY GIFT OF PROPERTY—LACHES—ACQUIESCENCE.

We now come to the recent *cause celebre* of *Allcard* v. *Skinner*, 36 Chy. D. 145, in which the plaintiff who, while a member of a religious sisterhood, had made a voluntary gift of all her property to the sisterhood under circumstances which, in the opinion of the Court of Appeal, were held to amount to undue influence, was, nevertheless, held by the court to be debarred from recovering, because, having left the sisterhood in May, 1879, and having then or shortly after, ample means of knowing her rights, she nevertheless neglected to take any proceedings to recover the property in question until August, 1885. This delay the majority of the Court of Appeal (Bowen and Lindley, L.JJ.) held to amount to acquiescence, so as to deprive the plaintiff of her remedy. But Cotton, L.J.. was of a contrary opinion as to the capital of the fund still in the hands of the defendant. We may observe that the bulk of the property had been expended for the purposes of the sisterhood, and that the appeal was restricted to what actually remained in specie in the hands of the donees, and the income which had accrued thereon since the plaintiff left the sisterhood. The judgment of Kekewich, J., was affirmed. It would appear from the judgment of the Court of Appeal that the question of whether or not a gift is made under the pressure of undue influence, is not to be determined by the position of the donor at the time he originally purposes to make the gift, but at the time it is actually made. Thus all the judges in appeal agreed that although the plaintiff was of full age and able to obtain independent advice at the time when she entered the sisterhood, and originally conceived the purpose of making the gift in question, yet that fact did not validate the gift, because at the time it was actually made the donor was unable to obtain independent advice.

SALE OF CHATTELS—ENTRY IN AUCTIONEER'S BOOK—STATUTE OF FRAUDS—BILLS OF SALE ACT, 1878—REGISTRATION.

In re Roberts, *Evans* v. *Roberts*, 36 Chy. D. 196, is an important decision of Kay, J., under

the Bills of Sale Act, 1878. At a sale of farm produce one Williams' purchased a stack of hay, the purchase money to be paid in six months. The auctioneer signed the name of Williams as purchaser in his book, which was also signed by the auctioneer, and contained a copy of the conditions of sale and specified the lot and price. The whole of the hay was suffered to remain on the premises in the apparent possession of the vendor, and was subsequently seized in execution under a judgment against the vendor. Upon an interpleader summons taken out by the sheriff, it was held by Kay, J., that as the sale would have been void under the 17th section of the Statute of Frauds but for the memorandum of sale in the auctioneer's book, that that memorandum therefore was an assurance and a bill of sale within the Bills of Sale Act, and was void as against the execution creditor for want of registration. It was admitted that there was no authority precisely in point, and the case was distinguished from *Marsden* v. *Meadows*, 7 Q. B. D. 80, on the ground that the sale in that case was complete so as to pass the property without any memorandum of sale, and therefore the memorandum of sale in that case was not necessary to the validity of the sale. Whereas, in the present case, but for the memorandum there would be no valid sale as Kay, J., puts it: "The Act of 1878 only avoids the bill of sale; it does not avoid any transaction of sale which is complete without it."

WILL—LEGACY OF SHARES—GENERAL OR SPECIFIC LEGACY—CHANGE IN NATURE AND VALUE OF SHARES BEQUEATHED AFTER DATE OF WILL.

In re Gray, Dresser v. *Gray*, 36 Chy. D. 205, is one of those hard cases constantly turning up in the construction of wills, whereby the intention of the testator is frustrated, and the hopes of a legatee are dashed to the ground, all because the testator has used language which the law is unable to construe so as to give effect to his intentions. In this case the testator, who died in 1887, by his will made in 1882, bequeathed to trustees "fifty shares in the York Union Banking Co." At the date of the will there was a company of that name in existence which was an unlimited company, the shares of which were £100 each. After the date of the will this company was converted into a limited company, and the shares were £60 each. The new company was styled "The York Union Banking Co., Limited," and each of the shareholders of the original company was entitled to exchange each of his shares in the old company for two of the shares of the new company. The testator exchanged seventy shares in the original company for 140 shares of £60 each in the limited company. And at the time of his death he actually held 171 shares in the latter company. It was conceded that the legacy was general and not specific, and Kay, J., so held; but it was contended that the will spoke from the testator's death, and was equivalent to a direction to purchase fifty shares in the limited company existing at the time of the testator's death. But it was held by Kay, J., that the gift must be construed to apply to shares in the company existing at the date of the will, and that as that company had ceased to exist there was no basis by which the value of such shares could now be ascertained, and therefore no means by which the amount of the legacy could be ascertained, and that therefore the legacy failed.

DEBENTURE—MEMORANDUM OF AGREEMENT—BILLS OF SALE ACT, 1882.

Edwards v. *Blaina Furnaces Co.*, 36 Chy. D. 215, appears to be important to note, because, although Chitty, J., decided that a memorandum of agreement made by a company in favour of certain parties to secure advances made by them to the company, and which, as security for the payment, charged therewith all the company's property, was a debenture, and therefore exempt by the Bills of Sale Act, 1882, s. 17, from registration as a bill of sale. Yet in this Province where we have no such provision exempting debentures from the operation of our Bills of Sale Act, this decision would serve to show that such a document, in order to its validity as against third parties, would require registration as a chattel mortgage.

MORTGAGE—SET OFF—ADMINISTRATION ACTION.

In re Gregson, Christison v. *Bolam*, 36 Chy. D. 223, was an administration action in which a contest arose between the executor and a mortgagee of the testator. The testator had mortgaged an estate for his own life to secure an annuity granted by himself, and payable during his own life. He had also mortgaged to the same mortgagees a policy of insurance

on his own life. After the testator's death the mortgagees received the amount of the policy, which was more than sufficient to secure the amount secured by the mortgage on the policy, and claimed to set off against the claim of the executors to the surplus, the arrears due to them on the annuity. But North, J., held that they had no such right. He says at p. 226:

The decisions are clear that a debt due by the testator in his lifetime, and for which his executor was never personally liable, cannot be set off against a sum never payable to the testator at all, and in respect of which he never had a right of action, but which first became payable after his death, and then became payable to the use of the executor.

There had been some conflict of authority on the point, and North, J., elected to follow the decision of Jessel, M.R., in *Talbot* v. *Frere*, 9 Chy. D. 568, rather than the decision of Lord Romilly, M.R., in *Re Haselfoot*, L. R., 13 Eq. 327; *Spalding* v. *Thompson*, 26 Beav. 637. and *Ex parte National Bank*, L. R. 14 Eq. 507,516.

APPOINTMENT OF NEW TRUSTEES—DEATH OF SOLE TRUSTEE IN TESTATOR'S LIFETIME—VESTING ORDER.

In re Williams Trusts, 36 Chy. D. 231, the sole trustee named in a will had died in the testator's lifetime. The testator's heiress-at-law had died intestate (after the Conveyancing Act, 1881, had come into operation), and there was no personal representative of her estate. North, J., on a petition for the appointment of a new trustee, which was served on the heir-at-law of the testator, made an order vesting the property in the new trustees for such estate as was vested in the heiress-at-law of the testator at the time of her death, notwithstanding that the Conveyancing Act provided that her estate as trustee should pass to her personal representative.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS—RIGHT OF PURCHASER TO ENFORCE RESTRICTIVE COVENANT—INJUNCTION.

Collins v. *Castle*, 36 Chy. D. 243, is a case in which a purchaser of part of a certain property, offered for sale subject to certain restrictive covenants as to building, was held entitled, by Kekewich, J., to enforce such covenant as against a purchaser of other parts of the same property, by restraining him from erecting buildings of less value than that stipulated for by the restrictive covenants subject to which the land had been sold. It was attempted on the part of the defendant to exclude the case from the ordinary rule, on the ground that although the property had originally been offered for sale at the same time, yet the sale to the defendant had been made subsequently to the purchase by the plaintiff. But this fact was held not to exclude the case from the law laid down by Wills, J., in *Nottingham Patent Brick and Tile Co.* v. *Butler*, 16 Q. B. D. 778, and approved by the Court of Appeal. The statement of the law by Wills, J., was as follows:

When the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees imposed for his own benefit and protection, or are meant by him, and understood by the buyers to be, for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers may enforce them *inter se* for their own benefit.

Applying this rule to the case before him Kekewich, J., granted the injunction as prayed.

SHARES — TRUSTEE — INDEMNITY—ACTION BEFORE CALL —DISCLAIMS OF LEGACY.

Hobbs v. *Wayet*, 36 Chy. D. 256, is a decision of Kekewich, J. Moneys belonging to A. were invested in the shares of a company in the joint names of A & B; the ultimate trust being for the estate of A. A predeceased B, and the company having gone into liquidation this action was brought by B against the representative of A's estate for indemnity against liability on the shares, before he had been placed on the list of contributors, and before any call had actually been made upon him, and he was held entitled to the relief prayed. The shares in question had been bequeathed by A to certain charitable societies, one of whom, apprehensive that the shares might be fraudulently disposed of by the personal representative, placed a *distringas* upon the shares; and another question in the case was whether the society had thereby precluded itself from disclaiming the legacy which by reason of the failure of the company had become *damnosa hereditas*, and the learned judge held that it had not.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Leeds and Grenville.] [September 29.

RAYMOND v. SCHOOL TRUSTEES OF THE VILLAGE OF CARDINAL.

School trustee—Right to dismiss teacher.

The right of public school trustees to dismiss a teacher hired by them, necessarily arises from the relation of the parties. 49 Vict. ch. 49, ss. 165-168, provides a proceeding by which the status or qualification of the teacher may be determined; and the result of such proceeding may be in effect the same as dismissal; but this enactment does not take away the inherent right of employers to dismiss.

Knapp, for appeal.

Shepley, contra.

C. C. Wentworth.] [September 29.

ROSS v. HAENEL.

Interpleader—Refusal to interfere with verdict.

Goods seized under an execution were claimed by the father-in-law of the execution debtor, under a chattel mortgage, and an issue was directed to be tried between the claimant and the execution creditors. At the trial no witnesses were examined, except the claimant and the execution debtor, and although they swore to the *bona fides* of the claim, the verdict and judgment of the court below were for the execution creditor.

This court refused to interfere.

F. Fitzgerald, for the appeal.

Osler (Hamilton), contra.

C. C. Grey.] [September 29.

MITCHELL v. VANDUSEN.

Costs—Discretion of judge in ordering and apportionment.

An action by the bailiff of one Division Court against the bailiff of another Division Court, to recover the proceeds of goods seized and sold by the latter under an execution against B., which, at the time of such seizure and sale, were under seizure, and had been advertised for sale by the plaintiff under executions which he also held against B. The action was tried without a jury by the judge of a County Court, who held that the plaintiff was entitled to recover, but deprived him of his costs and ordered that the defendant's costs of the action, and the costs of the seizure and sale of the goods should be deducted from the amount of the judgment.

The plaintiff having, by leave of the judge, appealed from the discretion exercised in the disposition of the costs, this court reversed the decision, and ordered the defendant to pay the plaintiff's costs.

HAGARTY, C.J.O., reversed his opinion as to the existence of any right in any judge to make a defendant pay the costs of a plaintiff who has failed to establish a right to recover, or to make a plaintiff who has substantially proved his right to recover, pay the costs of the defendant.

Per PATTERSON, J. A.—Rule 428 gives full discretion over the apportionment of costs, and in proper cases to deprive the successful party of costs, but does not extend to make any party, whether plaintiff or defendant, who is wholly successful in his action or defence, pay the costs of his defeated opponent.

Per OSLER, J. A.—The jurisdiction in question is one which does exist, though the circumstances in which it has been exercised are of a very special and unusual character.

Creasor, Q.C., for the appeal.

George Kerr, contra.

C. C. York] [Oct. 25.

COYNE v. LEE.

Chattel mortgage—After acquired property—Appeal—Practice.

A chattel mortgage conveyed to the plaintiff the stock in trade of the mortgagor as a general hardware merchant, etc., more particularly described in Schedule A.; all which goods and chattels were situate and lying on certain specified premises. Schedule A. set out the property and proceeded: "And all goods . . which at any time may be owned by the said mortgagor and kept in the said store for sale by him as a general hardware merchant . . and whether now in stock or hereafter to be purchased and placed in stock."

Held, affirming the judgment of the County Court of York, that the after-acquired property brought into the business in ordinary course, was covered by the plaintiff's chattel mortgage as against the executions of creditors of the mortgagor. No title to such property passed at law; the claim rested on the mortgagee's equitable title; as soon as the property was brought upon the named premises and into the named business, it was identified, and the equity attached.

The action out of which this interpleader arose was in the High Court of Justice; the interpleader issue and subsequent proceedings were transferred to the County Court of Middlesex, by an order under 44 Vict. c. 7, s. 1. A subsequent order recited that the parties had consented that the issue directed should be determined by the decision of the County Court of York on a special case agreed upon, and directed that the venue should be changed from Middlesex to York, and that the parties should proceed to the argument of the special case before the County Judge of the latter county.

Held, per PATTERSON and OSLER, JJ.A., that no appeal lay to this court from the decision of the County Court of York upon the special case, and that the appeal should be quashed.

McMichael, Q.C., for the appeal.

Clark, contra.

CHANCERY DIVISION.

Ferguson, J.] [September 29.

MAYS v. CARROLL ET AL.

Will—Devise—Next of kin—Period of distribution—Construction—Executor.

J. C. died, leaving a wife and a daughter, E. C. By his will, after giving all his property to his executors, to pay the whole income to his wife for life, or during widowhood, and after her death or second marriage, to pay the said income to his daughter E. C., yearly, if she had attained the age of twenty-one, for her life . . . he provided as follows: "And I hereby empower her, my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children, in such manner as she may think best. And if she have no children, then the said property to fall to my next of kin who may be living on this continent"; and further provided: "In case . . . then, notwithstanding anything heretofore provided, I will and direct that neither she, Ellen, nor any of her children, shall receive any portion of my property, and in such case my whole property shall be given to my wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin as above provided." The wife died and the daughter E. C. attained twenty-one, came into possession of the income, and died unmarried and without issue, having made a will appointing the plaintiff her executor. In an action by the plaintiff, M., as executor of the daughter E. C. against W. C. and F. McQ. as executors of the testator J. C. for the property which the defendants resisted on the ground that the next of kin of the testator other than E. C. were entitled to it, it was

Held, That the "next of kin" must be ascertained at the death of the testator J. C., and not at the death of his daughter E. C., and as E. C. was sole next of kin she had such an interest as would pass by her will, and the plaintiff as her executor was entitled to the property.

G. W. Field, for the plaintiff.

J. L. Murphy, for the defendants.

interferes, in the examiner's opinion, with the due execution of his duty as examiner.

Hands, for the plaintiff.

Echlin, for the defendants, Wm. Beatty & Son.

Q.B. Div. Ct.] [Nov. 28.

GOWANS v. BARNETT.

Discovery—Examination—49 Vict. c. 16, s. 12—Solicitor—Employee—Transfer.

The solicitor of a judgment debtor, who had absconded, transferred property of the judgment debtor to a purchaser, under power of attorney, and received the consideration money, $4,000. Upon an application to examine the solicitor under 49 Vict. c. 16, s. 12,

Held, that this provision being remedial and for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words will permit. The word "transfer" in the expression "any person to whom the debtor has made a transfer of his property or effects" should not be limited to the transfer of the title to the property or effects, but should be regarded as equally applicable to the transfer of the possession; and therefore the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of $4,000 had been made, for the possession of that sum had been transferred to him by the debtor.

Per ARMOUR, C.J.—The solicitor was also an employee of the judgment debtor within the meaning of the section.

Walter Macdonald, for the plaintiff.

J. R. Roaf, for the defendant.

FLOTSAM AND JETSAM.

ONE often comes across a tit-bit in looking over old reports. We note the following from 8 De G. M. & G., 538, where Lord Justice Knight Bruce thus delivers himself:—"This litigation owes its origin to the manner in which a series of professional gentlemen in the North of England permitted themselves to transact, or, in more accurate phrase to entangle and perplex, some legal business entrusted to their care. These licensed pilots undertook to steer a post captain through certain not very narrow straits of the law, and with abundance of sea room ran him aground on every shoal that they could make. A settlement made in June, 1824, on the marriage of the plaintiff, Captain James Robertson Walker and his late wife, Anne Walker, gave a joint power of appointment to them over the whole, and also a power of testamentary appointment (notwithstanding coverture) to the lady over some at least of the real estates here in contest. The settlement in other parts of it was erroneously framed, and for the purpose of curing the mistake, or mistakes, they executed in the year 1825, under the joint power, an instrument of appointment, which, correcting after a fashion that error or those errors, committed or was affected by another error or other errors."

SUICIDE AS A CRIME.—We extract the following: "Punishment will prevent some actual suicides, but much more will it prevent attempts by those who are so weak and infirm of purpose that they cannot successfully accomplish the act. That suicides are amenable to the argument of punishment, is evident from some well-established facts. In the first place, they are in general fastidious as to their mode of death. In cold countries and in cold weather death by drowning is avoided (Morselli, 324). Women avoid public places when they wish to destroy themselves. Among military men firearms are chosen as an honourable means of compassing their death. In the second place, fashion has an overwhelming influence, both in causing suicide and in determining the mode of death. If the State, by a well-defined and strictly enforced law, can to some extent counteract this influence, it will have accomplished a great end. * * But there must be a large class of cases where the interposition of society by an emphatic prohibition, and the imposition of a penalty on the delinquent

himself, could counteract the forces which impel weak-minded persons to lay violent hands on themselves. The punishment would be reformatory of the delinquent himself, and the example in his person would deter others from a similar course, while a mawkish sympathy might impel them to follow his example. But while a more stringent criminal law might prevent some attempts at suicide, if it did not prevent some successful acts, there is something to be said for the paternal mode of dealing with suicides which now prevails in Scotland. The causes which lead up to this crime are generally social, and legal and political remedies will effect only a partial cure. In the struggle for existence the weakest must succumb, and when they give up the fight their defeat assumes different shapes. It may be drunkenness or other vicious indulgence; it may be vagrancy, as in this country and the Eastern States of America; or it may be suicide. These various forms of defeat may be morally the same, and the particular one chosen will be determined by previous history and surrounding circumstances. And existence in different parts of the world means utterly differen things. Contrast existence in the east or south of Ireland with existence in Paris. There, though the struggle is severe, it is for mere life and with nature itself and the conscious failures are few. Here, men set themselves false, absurd and exaggerated ideals as the aim of life, and the failures are many. If we could change the Parisian conception of life we might make the suicide rate lower than the Irish, and what is true of Paris is true of our own country. We cannot, however, help feeling that even though the French Legislature were to pass a stringent law against suicide it would be inoperative, since in the present condition of French society it would come to the people in a foreign guise. The true remedies are economical, social, moral and relligious. No alteration of the law, and no stringency in its administration, will enable us to dispense with the efforts of the Christian philanthropist."—*Journal of Jurisprudence.*

BOOKS RECEIVED.

A TREATISE ON THE INVESTIGATION OF TITLES TO REAL ESTATE. By E. D. Armour, Barrister-at-Law. Toronto: Carswell & Co.

NATURAL LAW IN THE BUSINESS WORLD. By Henry Wood. Boston: Lee & Shepard.

Law Society of Upper Canada.

OSGOODE HALL.

CURRICULUM.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, four weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9 The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2.30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15 A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second vear and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

19. No information can be given as to marks obtained at examinations.

20. An Intermediate Certificate is not taken in lieu of Primary Examination.

FEES

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM FOR 1887 1888, 1889 AND 1890.

Students-at-law.

CLASSICS.

1887.	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, B. I. Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (1-33.) Cicero, In Catilinam, I. Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (1-33)
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical reading of a Selected Poem:—
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics and Somerville's Physical Geography; *or* Peck's Ganot's Popular Physics and Somerville's Physical Geography.

ARTICLED CLERKS.

In the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.
Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

RULE RE SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate by candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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Canada Law Journal.

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DIARY FOR DECEMBER.

16. Sun.....*4th Sunday in Advent.*
21. Wed.....Shortest Day.
24. Sat.....Christmas vacation begins in H. C. J. and C. C.
25. Sun.....*Christmas Day.* Sir M. Hale died 1676, æt. 67.
27. Tues ...J. G. Sprague, 3rd Chancellor, 1869.
30. Fri .....Holt, C. J., born 1642.

TORONTO, DECEMBER 15, 1887.

As usual we publish with this number the index for the current volume. The sheet almanac for 1888 will be ready in due course. Arrangements have been made for an addition to our editorial staff, and features of interest will be added to the Journal during the coming year.

WE learn from our namesake in England that "the right of appeal in *habeas corpus* is now definitely put beyond question by the decision in *Cox's Case*, unless the House of Lords, which we suppose will be appealed to as a matter of course, should take a different view. It was not intended by the Judicature Acts to take away a right of appeal, and yet an appeal for all practical purposes, by the prisoner, existed in the practice of allowing him to move four courts in turn for his release. If there is an appeal to the Court of Appeal at all, there must be an appeal by the prosecutor as well as by the prisoner. There is, therefore, this dilemma, either that there is an appeal on both sides, or the prisoner's rights are seriously interfered with. The only *tertium quid* is that the jurisdiction of the Courts of Queen's Bench and of Chancery survive in the corresponding divisions of the High Court, just as Terms still exist as a measure of time. This would be highly inconvenient, and contrary to the whole scheme of the Judicature Acts."

OUR cousins to the south of us are, as a rule, rather prompt men of business, and those who live under the jurisdiction of Judge Lynch have a pretty summary mode of administering criminal justice in a crude and an ancient fashion. How then are we to account for the fact that eighteen months elapsed between the massacre of policemen in Chicago by the anarchists, and the execution of four of the criminals who planned and put it into execution? We do not remember exactly how many months it took to bring Guiteau to justice, but it was a long time. In fact it took nearly as long in these cases to empanel a jury as it did for us to try, convict and hang Riel, though his offence was surrounded with many more difficult legal questions than either of the above cases, and the crime was committed in a unorganized territory where the law was in a very unsettled condition, and the practical difficulties in obtaining evidence and getting the trial enormously greater. The extent of the delay in the case of the Anarchists seems to have directed the attention of legal writers in the United States to the matter referred to. Can any reader answer the conundrum?

A DECISION of some interest in relation to the law of extradition has recently been given by Chief Justice Taylor in the Province of Manitoba. The prisoner, one Fant, was arraigned at the Winnipeg assizes last month on the charge of assaulting the chief of police with intent (as stated in the newspaper report) to feloniously murder him. It appears that the chief went to arrest Fant on the suspicion of stealing cattle, and brought him to a stable near the police station in a buggy, when the prisoner jumped out and

ran away. During the chase Fant fired, and wounded the chief in the leg. Fant escaped, but was arrested at Pembina, and sent back under extradition proceedings. For the defence it was urged that the prisoner was now being tried for an offence for which he was not extradited, that this was contrary to good faith, and that the prisoner had rights in the matter apart from any question between the Governments of the two countries. It seemed, however, to be the opinion of the Chief Justice, that the court should not consider, in a case where it is made to appear in evidence that the prisoner was extradited, and is there taking his trial as a consequence, whether or not the offence in the indictment is the same as that for which he was extradited, or whether it was an extradition offence at all. This view, if we understand the matter correctly, does not seem in accord with *Reg* v. *Burley*, 1 C. L. J. N. S. 34. The prisoner Fant was, however, ordered to be acquitted on the ground that the evidence would not justify a conviction for the offence charged.

LEGAL LEGISLATION.

THE report of the Committee on Legislation appointed by the County Law Associations to the Law Society on the progress made in the work undertaken by them, was published in our last issue. It is of sufficient importance to be referred to more at length.

The immediate object of the appointment of the committee was the revision of the practice and procedure in the courts, and the labours of the committee have, it appears, resulted in the framing of a code of civil procedure, which it is proposed shall supersede all existing written rules of procedure, and it is proposed that matters not expressly provided for shall, after the code takes effect, be settled by analogy to the code and not to the former practice.

One of the principal changes sought to be effected by the code is the establishment of fixed periodical sittings of the High Court in the various county towns throughout the Province. It has been found, as we anticipated, that it is impossible to provide for holding as many as four courts annually in every county town. But we think it will be found that in every county town at least as many sittings will be held as at present, and in some, where the business demands it, more sittings will be held than at present. The increase in the number of sittings involves the payment of extra circuit allowances to the judges, and the Dominion Government may possibly have something to say to the proposed increase in the number of sittings.

For the convenience of practitioners it is also proposed that instead of two judges sitting each week, the weekly business of all the Divisions shall be taken by one judge. There are two or three considerations to recommend this provision. It will possibly do something to get rid of the notion still prevailing that the Chancery Division is "still the Court of Chancery," and it will possibly tend to make the High Court somewhat more homogeneous than it is at present.

The concentration of the Toronto offices for filing pleadings and entering judgments in all the Divisions in one central office, is also aimed at, and is in every way desirable, and would no doubt be found beneficial. The principal difficulty in the way of its accomplishment however, is the non-existence of any suitable chamber at Osgoode Hall, where all the clerks who transact this part of the business in the various Divisions could be brought together. This we fear will be found a formidable obstacle in the way of carrying into effect this proposal of the committee.

The committee propose to abolish the office of judgment clerk, and make provision for giving deputy registrars (among whom we presume they intend to include the "local registrars") the same power of settling minutes of judgments as are possessed by the registrars, subject to the right to move to vary the minutes. According to the present practice the deputy registrars have the same power to settle minutes as the registrars; but before a motion to vary minutes will be entertained in the Chancery Division the judges have required that the dissatisfied party shall procure the minutes to be submitted to a judgment clerk. The object of the proposed change is, we presume, to enable the parties to appeal direct from the settlement by the deputy registrar to a judge. We are inclined to think that this would be no improvement. Many of the local registrars have had no experience whatever in equity practice, and consequently are quite unable intelligently to discharge the duty of settling minutes, when the judgment deals with equitable rights. In all such cases the officer, to settle the minutes of the judgment, ought to have some knowledge of equity practice, and know how the rights of the parties are to be worked out, and he should be familiar with those provisions which are inserted in judgments as a matter of course, in order to work out those rights. Instead of committing this duty to a class of men, many of whom are profoundly ignorant on the subject, we would suggest that it would be better to commit the duty of settling minutes of judgment in outer counties to the masters who have, or may be reasonably supposed to have, the requisite practical knowledge to enable them to discharge the duty satisfactorily.

The abolition of writs of injunction effected by the Judicature Act naturally leads the committee to suggest that the same principle should be extended to other extraordinary remedies, such as prohibition, certiorari, mandamus, habeas corpus, etc.

We do not quite understand what the committee mean when they propose to abolish references to arbitration. We presume that this proposal only relates to compulsory references in actions, and is not intended to affect voluntary references out of court, or the various statutory provisions regulating them.

The proposed abolition of orders *nisi* and summonses, and substitution of notices therefor, is manifestly desirable for the sake both of simplicity, uniformity, and the saving of time and expense; and the establishment of a uniform practice in motions for new trials is also exceedingly desirable. The suggestion that judgments should be drawn up, signed and entered as decrees were formerly drawn up and entered, strikes us as an improvement. This, of course, has only reference to the manner, and not to the place of entry—as all decrees in Chancery were entered in Toronto at the chief office of the court. It will be necessary to be careful that this practice is not unintentionally revived.

While on this point we may observe that there is no express statement in the committee's report of any intention to introduce any rule regulating the entry of orders. In the Chancery Division perhaps there is too great particularity in this respect, while in the other Divisions there is too great laxity. A careful revision of the class of orders which should be entered in full should be made, and such orders should be entered, no matter in which of the Divisions they are made.

The proposal to return to the former simple practice in Chancery in respect to demurrers, is a good one. The rules at present in force relating to the payment of money into court are not altogether satisfactory, and need improvement, and the proposal to require money paid in

derived from the collateral, this was a discharge of the collateral debt, notwithstanding such ignorance on the part of the holder."

In *Foster* v. *Singer*, Wisconsin Supreme Court, Oct. 11, 1887, it was held that where the garnishee employs defendant at a specified salary per month, to be paid at the end of each month, and the summons is served August 28th, he is not liable to plaintiff for defendant's salary during the month of August, the salary for that month being neither "then due" nor "to become due." The court said: "It seems to us evident that under the testimony given in this case, had Phillips brought his action for his salary for August, 1885, on the day the garnishee summons was served, viz., 28th of August, his action would have been prematurely brought, and he must have failed in his action. There certainly was nothing due to Phillips on the 28th of August, 1885. . . . The only other question in the case therefore is whether there was any thing 'to become due' from the garnishee to Phillips on the 28th of August, when he was served with the garnishee summons, within the meaning of the statute above quoted. We think this question has been answered by this court against the claim of the appellant. In *Bishop* v. *Young*, 17 Wis. 46-53, the present chief justice, in speaking of the construction to be given to the language of the statute above quoted, says: 'And the debts due or to become due evidently relate to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include the language 'to become due' a debt which might possibly become due upon a performance of a contract by the defendant in attachment. . . . There was nothing absolutely due to him at the time of service of garnishee process upon the respondent. And whether any thing would become due depended upon a contingency.' See also *Smith* v. *Davis*, 1 Wis. 447; *Huntley* v. *Stone*, 4 id. 491. Under the evidence in the case at bar there was nothing due absolutely from the garnishee to Phillips when he was served with the garnishee summons. The evidence clearly shows a hiring by the month for a salary to be paid at the end of the month, and according to the decisions of this court the contract is an entirety. Phillips could not recover any part of his wages unless he worked the whole month. If Phillips had quit work on the 29th he could not have recovered any part of his wages for the month. The debt therefore would only become due upon the contingency that Phillips continued to work for the garnishee for the entire month. See *Gordon* v. *Brewster*, 7 Wis. 355; *Lee* v. *Merrick*, 8 id. 229; *Jennings* v. *Lyons* 39 id. 553; *Diefenback* v. *Stark*, 56 id. 462; *Koplitz* v. *Powell*, id. 671. It can make no difference as to his liability whether the summons was served on the 28th day of the month or on the 2nd. In either case whether any thing would become due depended upon Phillips working the entire month; and if the garnishee is liable when served on the 28th, he would be equally liable if he had been served on the 2nd, if it appeared on the trial that Phillips had worked the entire month. See also upon this subject, *Hancock* v. *Colyer*, 99 Mass. 187; *Knight* v. *Bowley*, 117 id. 551; *Wood* v. *Partridge*, 11 id. 488; *Wyman* v. *Hichborn*, 6 Cush. 264. There is nothing in the case of *Jones* v. *St. Ouge*, 30 N.W. Rep. 927, which in any way changes the rule laid down in the case above cited in this court."—*Albany Law Journal.*

SERVANTS' WAGES DURING ILLNESS.

A recent decision of the courts reversing a decision of a magistrate, where an apprentice, who had been disqualified by illness from work, was held, nevertheless, entitled to claim the usual wages during this disability, shows that justices are apt to go wrong on this point. And as the subject is of great practical interest, and the circumstances must be of frequent occurrence, it will be useful to notice some of the authorities, so that justices may be able more accurately to discriminate the important elements of the question. In the case of domestic servants, the difficulty caused by illness is mitigated by this circumstance, that owing to the ready way of determining the contract by a month's notice, the loss can seldom be very serious

if deemed irksome; but as a rule the master requires to determine the contract altogether, in order to escape the duty of paying the usual wages while the servant is disabled, for as an old case expresses it, "the master takes his servant for better and for worse, for sickness and for health." Common charity has seldom allowed this point to be often contested in the case of domestic servants, but in the case of workmen and apprentices and skilled artists, there have been occasional litigations, and some of them attended with nicety. Again there are peculiar contracts where it is necessary for a court to consider whether the good health of the contracting party was not necessarily assumed as a condition of the contract, or as a basis on which the whole contract was founded. The simplest of the cases may, however, first be looked at.

In *Harmer* v. *Cornelius*, 5 C. B. N. S. 236, the question arose whether an artisan who had been engaged for a term to work in his art, and proved incompetent, could be discharged on that account, and the right to dismiss servants for illness, and the relations between master and servant were carefully considered by judges of great insight. A scene painter had been employed at wages of £2 10s. per week, to work at Manchester. An advertisement had been put in a theatrical newspaper asking for two first-rate panorama and scene painters, and the plaintiff was engaged and was set to paint some scenes, but in a short time was dismissed as incompetent. He then sued the employer for damages. After time taken to consider, Willes, J., delivered the judgment of the court to the effect, that when a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. If there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. Here the correspondence showed that there was an express representation that the plaintiff did possess the requisite skill. So the plaintiff lost his cause.

This decision paved the way to another more closely bearing on the subject of a servant's illness, namely, *Cuckson* v. *Stone*, 1 E. & E. 248. In that case the plaintiff had entered into an agreement to serve the defendant for ten years, in the capacity of a brewer, at weekly wages of 50s. with dwelling-house and coals in addition. During the service he was taken ill at Christmas, 1857, was confined to his bed until March following, and was unable to attend to work till June 19, following, when he tendered his services and was again employed as before; but the employer refused to pay the wages during his illness, and for this sum the servant sued. It was admitted that the contract had never been rescinded. Lord Campbell, C.J., said the court agreed with what Willes, J., said in *Harmer* v. *Cornelius*, and if the plaintiff from unskilfulness had been wholly incompetent to brew, or by the visitation of God he had become, from paralysis or any other bodily illness, permanently incompetent to act as brewer, the employer might have determined the contract. He could not be considered incompetent by illness of a temporary nature. But if he had been struck with disease so that he could never be expected to return to his work the employer might have dismissed him, and employed another brewer in his stead. Instead of being dismissed, the servant returned to the service, and was employed as before. The contract accordingly being in force, and never rescinded, there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract there could have been no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force there was no difference between his being so disabled for a day, or a week, or a month. Hence the servant succeeded in recovering his wages.

In the case of an apprentice becoming disabled, something obviously turns on the language of the indenture. In one remarkable case of *Boast* v. *Firth*, L. R. 4 C. P. 1, the father of the apprentice had covenanted that the apprentice would honestly remain with and serve the plaintiff as his apprentice during all the term agreed upon. And the master sued the father on the ground that this covenant was broken. The defence was that by the act of God the apprentice had become permanently ill, and the father thereby

was excused from performance of his covenant. The question raised was whether permanent illness caused by the act of God, and which commenced after the making of the indenture, was an answer. The court said that the whole contract was of a personal nature, and it must be taken that permanent illness or death must have been within the contemplation of the parties, and would override the liability of the parties under the covenant. A condition was obviously implied that the apprentice should continue in such a state as to be able to perform the service. And on that footing the father was held to be excused.

A case of a similar contract occurred in *Robinson* v. *Davidson*, L. R. 6 Ex. 269. The plaintiff was a contractor for musical entertainments, and had agreed to pay £20 to the husband of Arabella Goddard so that she would perform on the piano with other artists, but she failed to appear at the appointed time. The reason was that she was too ill to perform. The plaintiff sued for damages for breach of agreement. The defendant accordingly set up this excuse as an answer to the action. The question again was, whether illness was an excuse, and the point was argued at length. Kelly, C.B., in giving judgment, quoted another decision in *Hull* v. *Wright*, E. B. E. 746, where it was laid down as law that all contracts for personal services which can be performed only during the lifetime of the party contracting, are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by a painter to paint a picture within a reasonable time would be deemed subject to the condition that if the painter became paralytic, and so incapable of performing the contract, by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death. So in this case of the artist engaged to play the piano, the parties must have known their contract could not be fulfilled unless the defendant's wife was in a state of health to attend and play at the concert on the day named. The court at the same time held, that it was the duty of the lady to give early notice of her inability, so as to lessen the loss that might fall on the plaintiff.

Thus the servant is, as a rule, entitled to the wages during illness, and if sued can set up illness as an excuse for performance. Here again arises a distinction that might occur to most people, namely, whether if the illness is caused by the servant's imprudence or misconduct the same consequence follows. This very point was decided in *R.* v. *Raschin*, 38 L. T. N. S. 38. The plaintiff was a merchant's clerk engaged at a salary of £120 a year. He became unwell on 30th July, and obtained permission to be absent from work till 6th August following. He remained away, and was under medical treatment and unable to return till the first week in September, when he tendered his services which were declined. The employer had meanwhile, on 20th August, given him notice terminating the employment from that date. He claimed wages from 1st August to 20th September, during the absence; but the employer declined on the ground that the clerk had by his own misconduct (which was proved at the trial) rendered himself incapable of performing his duties. The plaintiff being nonsuited, leave was given to enter a verdict for the plaintiff, and after argument, the court held the plaintiff to be entitled. Cleasby, B., said that the question was, whether or not illness was such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it. *Prima facie* illness is to be attributed to the act of God, and the court is not justified in going back for any length of time and entering into an investigation as to what may have been the cause of it. The effect of disability from illness is not to be extended. The illness which rendered the plaintiff unable to perform his duties for a time came upon him unexpectedly, and the court cannot go back to first causes and into the question of how it arose. The maxim, *causa proxima non remota spectatur*, is applicable. As to precisely how the disease arose, there may be different opinions and the greatest uncertainty. It was merely a misfortune which could not have been foreseen at the time the contract was made, and the servant was entitled to wages.

The case of *Carr* v. *Hadrill*, 39 J. P. 246, may also be referred to as confirming the previous cases. A biscuit baker had been employed on the terms of a week's notice. One day he sent word that he was ill and unable to attend, and on inquiry this was found to be correct. After an absence of five weeks he returned, when the master refused to allow him to resume work. No notice had been given by the master to quit the service. The Court of Queen's Bench held that the contract was not discharged by the servant's absence from illness and, being still a servant, was entitled to his wages, and to return to work till he got a week's notice to leave.

The same doctrine was further confirmed in the case of *Poussard* v. *Spiers*, 1 Q.B.D. 410. The plaintiff agreed to sing and play in a female part in a new opera at a weekly salary of £11 for three months. The first performance was to be on the 28th November, She attended several early rehearsals, but the final rehearsal had not arrived when the plaintiff was taken ill. She continued unwell and unable to attend the rehearsals for the first performance on 28th November, so that another artist had to be engaged temporarily. On the 4th December the plaintiff was well enough to perform and tendered her services, but these were declined. The question of importance was whether the employer was entitled to rescind the contract when it was discovered that the plaintiff was so ill as to endanger the success of the opera. And the court held that as the inability to attend the first performances went to the root of the matter, it entitled the employer to rescind the contract.

The recent case of *Patten*, *appellant*, v, *Wood*, *respondent*, *ante*, p. 549, was scarcely needed in order to ascertain the law bearing on these matters, but as the magistrate made a mistake, it obviously requires to be borne in mind how the law stands. The appellant, a plumber, had taken as apprentice the respondent, and the deed covenanted that he should pay the apprentice, after a certain date, 14s. a week. During that year the apprentice had a tumour in his right hand, and it necessitated his going to a hospital to be treated, and he became an in-patient for a fortnight and underwent an operation. For the next fortnight he was an out patient. The apprentice claimed wages during his absence and the master refused, whereupon the application was made to justices under 38 & 39 Vict. c. 90, for an order on the master to pay these. The magistrate refused and held that the master was not liable. The court, however, held that the magistrate was wrong, and that the series of cases which had established the right of the servant had been overlooked. Such a point can scarcely indeed be argued when the authorities are properly understood and applied.—*Justice of the Peace.*

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Proudfoot, J.] [November 9.

SMITH v. FAIR.

Trade mark—Canadian and Imperial Acts—Colour—Seal—Former action—Account of profits—Necessity for registration—Goodwill—Assignment.

Action by the plaintiff, a cigar manufacturer, to restrain the defendant from infringing certain of the plaintiff's trademarks, amongst others a certain trademark consisting of a seal with portions of ribbon attached and the letters "R. S." forming a monogram above, below, and beside it, and the words "Red Seal"; and also a similar seal but made of wax or other composition, with portions of ribbon attached and the letters "R. S." in monogram thereon.

Held, the above constituted a good trademark.

The Canadian Trademark and Design Act of 1879, sec. 8, defines trademarks in much more comprehensive terms than the Imperial statute of 1883, sec. 64, and some care must be used in considering decisions in the English court.

The word "Red" and the word "Seal" may each be admitted to be *publici juris*, but when combined and applied to a specific manufacture they cease to be so, and can well be protected as trademarks. Single or more letters may also form a trademark, and more especially when combined, woven, or entwined into a monogram.

Under the Imperial Act, sec. 67, a trade. mark may be registered in any colour, and the registration confers on the registered owner the exclusive right to use the same in that or any other colour. and our Act should be construed to have as extensive an application.

Held, also, that the fact that the plaintiff had brought a former action against the defendant which action he had discontinued upon the court expressing a view that an action could not be brought until he had registered his trademark under the 4th section of the Trademark and Design Act of 1879, did not now prevent him now that he had registered it ascertaining his right under the registration.

Held, also, that the account of profits which the plaintiff was entitled to should not be limited to the date of the registration, although he might not have been able to sue on the trademark till it was registered, though this act might admit perhaps of a different consideration if the defendant had infringed the trademark innocently, which however he had not in this case.

Semble, that it is only where a trademark has been infringed innocently that a plaintiff must register before suing.

There is no provision in the Canadian Trademark and Design Act of 1879 similar to sec. 70 of the Imperial Act of 1883, providing that a trademark, when registered, shall be assigned and transmitted only in connection with the goodwill of business concerned in the particular case in which it has been registered.

Held, also, that a plain seal of wax to be used on a cigar box was a good trade mark within the terms of the statute.

Meredith, Q.C., and *MacBeath*, for the plaintiff.

McMichael, Q.C., and *H. M. Wilson*, for the defendant.

Boyd, C.] [Nov. 22.

LICENSE COMMISSIONERS v. COUNTY OF FRONTENAC.

Canada Temperance Act—Provincial Acts in furtherance thereof — Constitutionality — Revision of the Statutes of Canada.

Held, that the adoption of the Canada Temperance Act by the municipality of Frontenac has not been changed or interfered with by the revision of the Statutes.

The effect of the revision of the Statutes, though in form repealing the Act consolidated is really to preserve them in unbroken continuity.

Held, also, that R.S.O. c. 181, s. 92, 93, 105, 106; 41 Vict. c. 14, s. 6, 8; 44 Vict. c. 27, s. 11-14, 16; 47 Vict. c. 34, s. 34; 50 Vict. c. 33, by which ways and means are provided for the enforcement of the Canada Temperance Act by the application of local funds raised by local taxation or otherwise in the county, are not *ultra vires* of the Local Legislature.

The general law as to Prohibition respecting all Canada, which can only be enacted by the Dominion, being localized by municipal suffrages, its enforcement becomes also a matter of local importance in the Province within the meaning of the B.N.A. Act, s. 92, item 16.

Britton, Q.C.. for the License Commissioners.

Walkem, Q.C., and *Agnew*, for the municipality.

PRACTICE.

Chy. Div. Ct.] [Dec. 1

FARRAN v. HUNTER.

Jury notice—Action to enforce lien on land—Severing issues.

An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action to which a defence is raised. Such an action would have been in the exclusive jurisdiction of the Court of Chancery before the Judicature Act, and a jury notice is therefore

improper under s. 45. A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action.

Temperance Colonization Society v. *Evans*, 12 P. R. 48; *McMahan* v. *Lavery*, 12 P. R. 62, distinguished.

Watson, for the defendant.

T. Langton, for the plaintiff.

Chy. Div. Ct.] [Dec. 2.

RE MCRAE v. ONTARIO AND QUEBEC R.W. CO.

Costs — Taxation — Appeal — Arbitration — Witnesses—Subpœnas—R. S. C. c. 109, s. 8, ss. 22, 23.

The order of PROUDFOOT, J., in Chambers, 12 P. R. 282, affirmed on appeal.

J. M. Clark, for the appeal.

Aylesworth, contra.

DOMINION CONTROVERTED ELECTIONS ACT.

The following is a form of order for particulars in a controverted elections case settled by Mr. Justice Osler, J.A., in the case of *Saylor* v. *Platt*, on October 1st, 1887. It may be of use to record as a precedent. Comparison may be made with the order in *Dickson* v. *Murray*, 19 C. L. J., N. S. 211.

1. It is ordered that the petitioner do not less than fourteen days before the trial hereof deliver to the respondent, his solicitors or agents full particulars in writing of the "bribery, treating and undue influence and intimidation" charged in the fourth paragraph of the said petition, showing the places where and the times when the said alleged acts of bribery, treating and undue influence and intimidation were committed, the names, addresses and occupation respectively of the persons so bribing, treating and exercising undue influence and intimidation, and of the persons alleged to have been bribed, treated, influenced or intimidated respectively, and in each case the nature of the said acts of bribery, treating, unde influence and intimidation.

2. And it is further ordered that the said petitioner do not less than fourteen days before the trial hereof deliver to the said respondent, his solicitors or agents full particulars in writing of the "personation" charged in the fifth paragraph of the said petition showing with particularity the places where and the times when the said alleged acts of personation were committed, the names, addresses and occupations respectively of the persons so personating and of the persons alleged to have been personated, and also full particulars in writing of the acts of inducing persons to commit personation charged in the said fifth paragraph of the said petition showing when, where, by whom and upon or in reference to whom the said acts are alleged to have been committed.

3. And it is further ordered that the said petitioner do not less than fourteen days before the trial hereof deliver to the said respondent, his solicitors or agents full particulars in writing of the "hiring and promising to pay for" conveyances charged in the sixth paragraph of the said petition, the places where and the times when the said alleged acts of hiring and promising to pay for were committed, the names, addresses and occupations of the persons so hiring and promising to pay, and of the persons alleged to have been paid for hire of teams and conveyances, and also in each case the amount or approximate amount so paid or promised to be paid, also full particulars in writing of the acts of "paying travelling expenses of voters" charged in the said sixth paragraph of the said petition showing the times when and the places where the said expenses are alleged to have been paid, also the amounts or approximate amounts paid, and the names, addresses and occupations of the persons by whom and of the persons to whom the said expenses are charged to have been paid.

4. And it is further ordered that the said petitioner do within the time aforesaid deliver to the respondent, his solicitors or agents full particulars in writing of the "other corrupt practices" charged in the seventh paragraph of the said petition and relied upon by the said petitioner, showing the times when, the places where the said corrupt practices were committed, and also the names, addresses and occupations of the persons concerned therein, and in each case the nature of the corrupt practice.

5. And it is further ordered that within the time aforesaid the said petitioner do deliver to the said respondent full particulars in writing of the agent and other persons mentioned in the 4th, 5th, 6th, 7th, 8th and 9th paragraphs of the said petition respectively, showing their names, addresses and occupations

6. And it is further ordered that no evidence shall be given by the said petitioner under the said paragraph of the said petition of any matter not specified as aforesaid in the said particulars except by leave of a Judge upon such terms as may be ordered.

7. And it is further ordered that the costs of this motion be costs in the said petition.

LAW STUDENTS' DEPARTMENT.

LAW SOCIETY EXAMINATION PAPERS.

First Intermediate.

SMITH'S COMMON LAW.

1. When is a servant's knowledge of a dog's ferocity the knowledge of the master?

2. When both *wrongful imprisonment* and *malicious prosecution* exist in the same case, at what different times do they respectively begin?

3. When one person, at the request of another, does an act, not apparently illegal, but which injures a third person, what is the law, as to the liability of the person who requested to the person who did the act?

4. Under what circumstances may a landlord distrain for rent after the expiration of the lease?

5. Are there any, and, if so, what *presumptions* of law in regard to the *life* or *death* of a person?

6. What is the common law liability of the publisher of a newspaper for defamatory matter contained in (*a*) a report of a debate in Parliament; (*b*) a report of what passes at a public meeting?

7. What right has a landowner in regard to *lateral support* to his own land from the land adjoining it?

ANSON ON CONTRACTS.—HONOURS.

1. What distinction is there between communication as it is used for acceptance or revocation? Illustrate by example.

2. Distinguish present from past consideration.

3. A. agrees with B. to sell an estate consisting of certain plots of land for $1,000: on adding up the values of the plots he finds he has made a mistake, and that they are worth $2,000. Can B. enforce the contract? Why?

4. What are the rules as to the tests of illegality of contracts which are made in breach of Statutes?

5. A. holds a note for $500 made by B. to C. and transferred by C. to A.; the note was dated 15th November, 1880, and was payable three months after date; no sum was paid on the note until the 15th January, 1887, when C. paid $100 on it to A.; A. endorsed the receipt of the money on the note and sold the note to D. How far can B. rely on the Statute of Limitations?

6. A is a servant who wishes to obtain a situation with C.: he asks B., a former employer, to give him a character; B. thereupon refuses to give one in writing, but verbally gives him a good one to C.; the character is false, but C., relying upon it, employs A. What remedy has C. against B.?

7. What statutory provisions are there as to joining in one action the parties on a promissory note? How are the rights of the parties between themselves affected by being so joined?

Second Intermediate.

REAL PROPERTY.

1. Why could not a corporation convey by bargain and sale at common law? How is this point affected by legislation?

2. An infant purchases land, and dies under age. Can his heirs avoid the contract? Why?

3. After a mortgagee's death, who can discharge the mortgage? Why?

4. Can the owner of land who has been forcibly dispossessed, lawfully recover possession by his own force? Explain fully.

5. What is meant by a wife's equity to a settlement? Is it affected by recent legislation? If so, how?

6. A tenant for life makes a lease for years, the rent being payable annually. A few days before the day for paying the rent, he dies. Who is entitled to the year's rent? Why?

7. What formalities are required to be observed in the execution of a will?

EQUITY—HONOURS.

1. What are the essential elements required in order to raise a case of Election? Illustrate.

2. Distinguish between an Express trust, a Constructive trust, an Implied trust, a Resulting trust Give an illustration of each.

3. Discuss briefly the general law as to the enforcement by specific performance of (*a*) Contracts respecting chattels personal; (*b*) Contracts respecting land.

4. Distinguish between the construction put by a Court of Equity on (*a*) executory trusts in marriage articles, (*b*) executory trusts in wills, and give an example.

5. Are there any exceptions to the maxim "*Ignorantia juris non excusat?*" If so, what? Illustrate.

6. In what cases did Courts of Equity interfere to prevent waste?

7. In what cases will a Court of Equity decree a dissolution of partnership at the instance of one of the partners?

Certificate of Fitness.

MERCANTILE LAW—STATUTES—PRACTICE.

1. What modes are there of *winding up* joint stock companies? Explain briefly the procedure.

2. What advances can an agent legally charge against his principal?

LAW STUDENTS' DEPARTMENT.

3. In what cases is the maker of a note or the acceptor of a bill entitled to presentment?

4. Under what circumstances can a creditor legally claim interest on his claim against a debtor?

5. When goods are distrained for arrears of interest or rent what notice of sale is required?

6. A. executes a chattel mortgage to B., and subsequently assigns to C. for the benefit of all his creditors; E. and F. are execution creditors of A., with writs against goods in the Sheriff's hands. What steps can be taken, and by whom, to contest the validity of B.'s chattel mortgage?

7. In a redemption suit on default of payment according to the report what right has the defendant?

8. What is the position of a third party as to production of documents and examination, such third party having been brought into the action by a defendant, and having entered an appearance?

9. What is the general rule as to what facts must be pleaded by a party in an action?

10. On an assignment of a chose in action what effect has notice in writing to the original debtor of the fact of such assignment?

Call to the Bar.

HARRIS ON CRIMINAL LAW—BROOM'S COMMON LAW —BLACKSTONE, VOL. I.

1. Explain what is meant by *involuntary* manslaughter?

2. What statutory change has been made in the common law mode of trying *accessories?*

3. Define the crime of *embracery*.

4. On a trial of A. for the murder of B., will evidence be received to prove that, on a former occasion, A. attempted to murder B.? Reasons.

5. What are the three classes of acts which the crime of *treason* comprises?

6. What facts are necessary to make a *finder* of goods guilty of *larceny?*

7. What facts must be proved to establish a case of *slander of title?*

8. Explain briefly the nature of the *malice* which is required to support an action for *malicious prosecution?*

9. Of what four parts does every law consist according to Blackstone?

10. What is the effect upon a statute of a saving clause which is totally repugnant to the body of the Act? Why?

CONTRACTS—EVIDENCE—STATUTES.

1. A. asks B. to put his name on the back of a bill of exchange, telling him that it is a guarantee. B. does so on the faith of the representation, and without seeing the face of the bill. How far is B. bound? Why?

2. A. makes a will by which he leaves a large share of his estate to B., who is not a relative. A.'s relatives attack the will, and seek to throw the burden of proof that the will was not improperly made in B.'s favour upon B. How far are they right? Why?

3. In what circumstances, and to what extent is the knowledge of the parties material on the question of illegality?

4. There is an agreement between A. and B. that B. shall perform certain services. On being asked by A. what he will want for performing such services, B. answers, "I leave it to you." B. performs the services, and then A. declines to pay anything. How far can he do so? Why?

5. What does an acceptance of a bill of exchange admit?

6. A. is indebted to B., and to pay his debt hands A. a bill of exchange, drawn at two months by A. on C.; C. refuses to accept; B. thereupon sues A., who claims that A. having taken the bill, has suspended his remedy thereby. How far is he right? Why?

7. In an action on a bill or note, how do you prove the signature of the defendant?

8. Mention any presumptions drawn from usages of trade.

9. A counsel desires to cross-examine a witness as to previous statements made by the witness in writing without showing the witness the writing. How far can he do so?

10. A. is sued upon a contract by B. He seeks to prove: (*a*) that it was illegal: (*b*) that it was fraudulent. How far can he do either?

EQUITY.

1. Distinguish between the rights of an unpaid legatee to compel other legatees to refund—(*a*) where there was an original deficiency in the assets; (*b*) where there has been waste by the executors.

2. A. and B. are public singers. A. enters into a bond with B. that he will not sing in Toronto for one year, the penalty in the bond is $2,000. A. desires to break the agreement and offers B. $2,000; he refuses it and issues a writ for an injunction restraining A. from singing. Should he succeed? Explain.

3. What is meant by election to take under an instrument and against? Explain the general law.

4. What is the nature and operation of a solicitor's lien? Is there any difference between a lien on deeds and books of a client, and a lien upon a fund realized in an action?

5. Explain the doctrine of consolidation of securities. How is it affected by Ontario legislation?

6. A mortgagee in possession spends a considerable sum of money in improving the property. On the mortgagor coming in to redeem, he seeks to have this sum made a portion of the redemption money. Should he succeed? Explain fully.

7. State the general circumstances under which a court will appoint a receiver? What are the duties of a receiver in bringing and defending actions?

8. In what cases will an account be decreed between partners when no dissolution is sought.

9. There are several mortgagees of a property entitled to an undivided part of the money; they have all gone into possession; in the tenth year of their possession one of them gives the mortgagor an acknowledgment in writing, signed by himself, of his (the mortgagor's) title. What effect will such acknowledgment have. Supposing the case to be one of one mortgagee in possession and several mortgagors, to one of whom acknowledgment is given by the mortgagee, who is entitled to redeem. Give authority for your answer.

10. In what case will a Court of Equity direct the delivery up of: (*a*) void; (*b*) voidable instruments? Upon what principle is relief granted?

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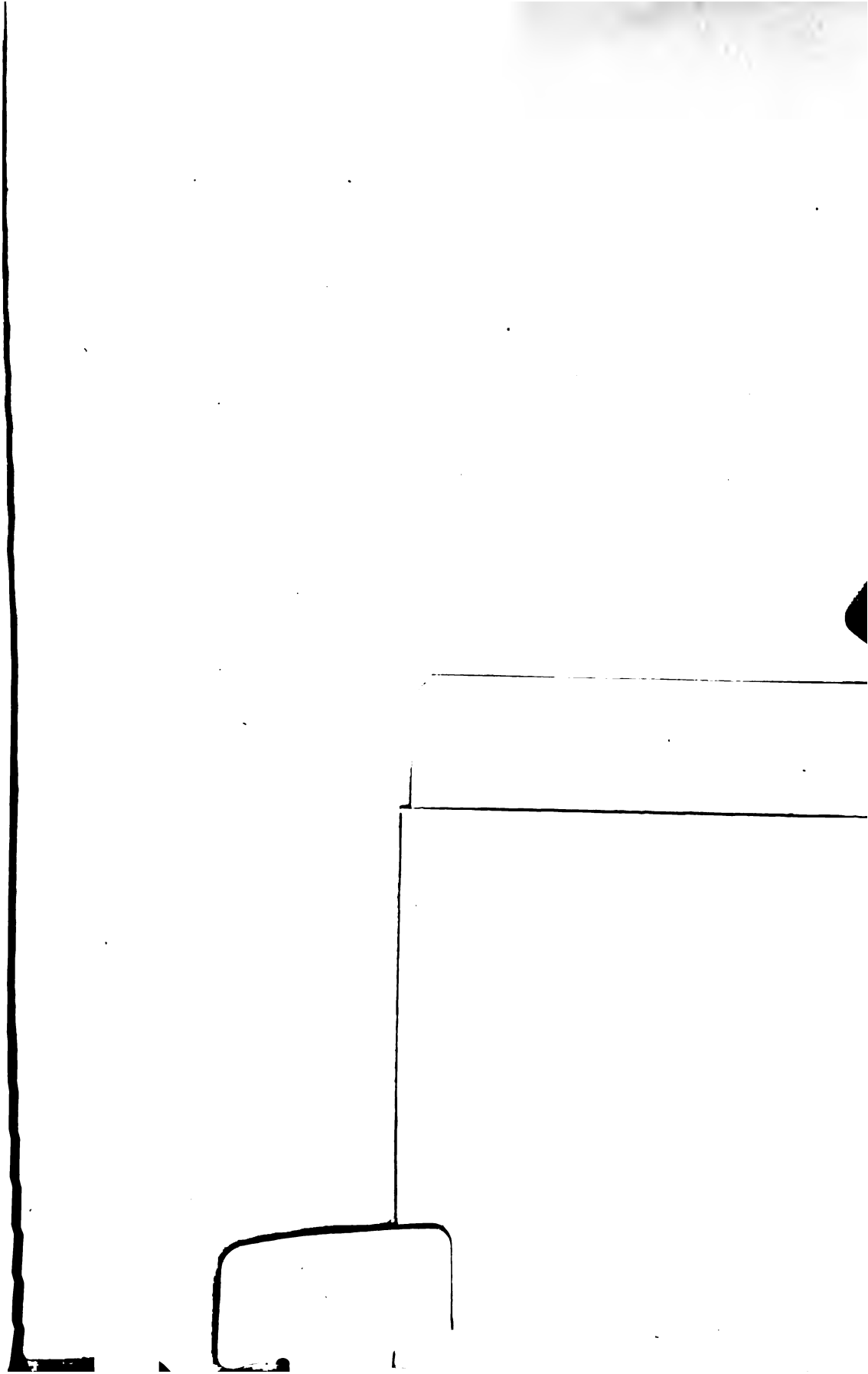
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